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Walton Series

A Treatise on American Business Law

With Illustrative Cases

In Seven Volumes

By Frank Hall Childs, LL. B.

of the Chicago Bar

Professor of Law, Chicago-Kent College of Law, 1898 to 1903; Member of Faculty of Armour Institute of Technology; Author of a Handbook on Suretyship and Guaranty, and of a Treatise on Personal Property; Editor of Ewell on Fixtures; and Contributor to Cyclopedia of Procedure and Practice.

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"A knowledge of law should be the possession of the many and not of the few."

CHIEF JUSTICE WINSLOW.

SALES

SALES

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CHAPTER I.

DEFINITION, ELEMENTS, AND CLASSIFICATION.

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DEFINITIONS.

1. **A Sale is a contract having for its primary object the transfer of the absolute property in corporeal chattels for a price in money terms, whether such transfer is to be made at once or in the future.**

Sale is also the designation given to the transfer itself.

Property, in this definition, means "ownership."

A transfer of less than the absolute ownership is a Bailment.

As is the case with many legal terms, "sale" is used with different significations. The first refers to the contract which has for its chief object the transfer of the ownership of corporeal chattels, even though the intended transfer never may occur. The second refers to the transfer of the ownership of corporeal chattels. The two meanings will become more apparent when the classification of sales is reached.

Each of the United States is a separate jurisdiction with more or less dissimilar laws. Formerly, when the population of the country was small and transportation slow, trade necessarily was local, and dissimilarity in laws was not

detrimental; but with the extended range of commerce in modern times, much confusion results. Hence an effort is being made to have the different States enact uniform laws on the leading points of commercial subjects, one of which laws, known as the "Uniform Sales Act," already has been adopted in several of the States. It is set forth in full in Appendix A, *post,* and reference to its sections will be made in the text from time to time in connection with the common law rules. In those States which have adopted it, the Act supersedes the common law rules so far as they may be inconsistent.

A sale probably is the contract of most frequent occurrence. It must possess all the elements required in any contract, that is, there must be two competent parties who have come to an agreement originating from an offer and its acceptance, and which is genuine and free from illegality, and there must be a consideration. In addition there must be a subject-matter whose ownership is intended to be transferred.

The attention of the student is directed particularly to the word "property" used in the definition, whose meaning must be fully understood or confusion will result. "Property" has two meanings—"something owned" and "ownership"; and it might be used in each sense in one sentence; but the student will not have any difficulty after he has once grasped the distinction. *A* might say to *B:* "This watch is property of mine and I will transfer the property in the watch to you for $50." Substituting the proper meanings, *A* has said in effect: "This watch is *something owned* of mine and I will transfer the *ownership* in the watch to you for $50." If the meanings are transposed, the sentence becomes senseless, as: "This watch is *ownership* of mine and I will transfer the *something owned* in the watch to you for $50." The object of a sale is a transfer of ownership

2. Goods for money
3 Delivery of Goods
4. Payment [illegible]

and not necessarily the possession. While, in most cases, a sale eventually results in a change of possession, it frequently happens that the buyer never takes actual possession, and may not even see the goods. It is not uncommon for a person who has bought goods to resell them before he has received or seen them, the goods being sent direct to the person who bought them at the last sale. It is obtaining ownership rather than possession that is sought by a sale; for with ownership goes the right to possession. "Property," then, in the definition of a sale, means "ownership" and not "goods."

It must be noticed, further, that it is the *absolute* ownership which is transferred by a sale. (See Appendix A, Uniform Sales Act, §76.) In very many transactions in life the owner of property transfers to another person a special, limited or qualified ownership which is not a sale, but is called a Bailment. (See Appendix C, Case No. 6.) Thus, a horse is hired by a farmer for use on his farm for a month, and the horse is delivered to him. To all outward appearances the farmer is the owner—he uses the horse and takes care of it. He thus has a limited amount of property in the horse which gives him a right to its possession and use for a month without interference from anyone; but superior to his property in the horse is the ultimate right of the owner of the horse. The owner retains the *absolute* property which he could transfer by a sale even while the horse was in the possession of the farmer. Only a special property was transferred to the farmer, and he became merely a "bailee." He might possibly assign his limited ownership but he could not transfer absolute ownership, as he does not have it. The distinction, then, between a sale and a bailment is that the former transfers the absolute property in goods, the latter, a special property only. (See Appendix C, Case No. 1.)

PARTIES.

2. The parties to a contract of sale are the—

Seller, the one who transfers the property.

Buyer, the one to whom the property is transferred.

If, before the rights of the parties are fully adjusted, the subject-matter is resold by the buyer to another person, the latter is designated as the Sub-buyer.

The parties to a sale are known as the seller and the buyer or purchaser.

Frequently, before all the rights between the seller and the buyer have been fully adjusted, the buyer resells the goods to a third person, in which case, for convenience, the latter is designated as "sub-buyer or "sub-purchaser." This avoids the use of such expressions as "the original seller," "the second buyer" and the like. Thus, if *A* make a contract to sell to *B*, and, before payment and delivery, *B* resells the goods to *C* who pays *B* for them, and *A* refuses to deliver the goods to *C* before *A* is paid, in discussing the rights of the parties the latter transaction would be designated as a sub-sale, and *A* would be called the seller, *B*, the buyer, and *C*, the sub-buyer.

SUBJECT-MATTER—WHAT MAY BE.

3. Real property is not governed by the law of Sales, except—

Growing crops, although immature.

Articles temporarily annexed to land.

Articles firmly annexed to land, but transferred with the expectation of their immediate severance.

A transfer of money is not governed by the law of Sales.

The law of Sales in some States applies to corporeal chattels only; in some it includes intangible rights evidenced in tangible form; while in others it applies to chattels of all kinds.

A part interest may be the subject of a sale.

It must be borne in mind that the principles laid down in this volume do not apply to real property, transfers of which are governed by peculiar rules which will appear in a later volume. In speaking of transfers of real property it is customary to use such terms as "convey," "grant," "vend" and the like; and, although it is not incorrect to speak of "selling" real property, "sales," as here used, is confined to property not real property.

Articles affixed to land where the annexation is temporary only, such as growing crops, and articles annexed by a tenant, are regarded as personal property so far as transfers of ownership are concerned. Generally, articles firmly annexed to land, as trees and houses, being real property while so annexed, must be transferred as real estate; but if it is the intention of the parties that the ownership of such articles is transferred with the expectation of their immediate removal, and the parties have in mind the severed articles, the transaction is treated as a sale of goods. (See Appendix A, Uniform Sales Act, §76. See, also, Contracts, Case No. 25.)

For reasons of public policy, money is not subject to the rules governing sales. It is the circulating medium—mere machinery to aid in accomplishing the various transactions of life, and it would fail to accomplish its purpose if its transfer were governed by rules applying to transfers of goods. If a particular piece of money, on account of its rarity, possessed a value in excess of its face, it might be treated as a commodity and sold as such. The rules governing transfers of money will be discussed later in the series.

In some States corporeal objects only can be the subjects of a sale, intangible rights, such as promissory notes, being excluded, as such rights more properly are assigned or negotiated; in other States, securities having a visible and tangible form and being common subjects of transfer, as corporate stocks and bonds, are governed by the law of Sales; while in still other jurisdictions, transfers of mere intangible rights not evidenced by any writing are held to be governed by the rules applicable to goods.

If two or more persons together own an article, one of them can sell his interest therein to a third person without the consent of the other or others, the buyer acquiring all the rights of the seller, but no greater rights, that is, the buyer would become a co-owner with the remaining owner or owners. An owner of the entire interest in property can sell any undivided part of his interest so as to make the seller and the buyer or buyers owners in common. (See Appendix A, Uniform Sales Act, §6.) Likewise, one part owner can buy the interest of another part owner, and thus acquire the entire ownership. (See Appendix C, Case No. 8.) A part owner can sell even a part of his part interest either to a third person or to another part owner.

SUBJECT-MATTER—SPECIFIC AND UNASCERTAINED GOODS.

4. Specific or Ascertained goods are certain definite and identified articles which both of the parties have in mind when the contract is made.

Unascertained, Unspecific or Future goods are those of a certain kind which the parties have in mind, but they do not contract with reference to any particular articles.

As will be seen throughout this subject, the rights of the parties in many cases depend on whether they have contracted with reference to certain definite and particular

articles, or whether they merely have in mind articles of a certain class or description. The former are known as specific or ascertained goods, and the latter as unascertained or future goods. If specific goods be the subject-matter of the sale, the seller could not perform his contract by delivering any other articles although exactly like those sold and equally as good; but if the subject-matter of the sale be unascertained goods, the seller would perform his contract by tendering any articles conforming to the terms of the agreement. An agreement to sell "this watch" would be a sale of specific goods; while an agreement to sell a "watch like this" would relate to unascertained goods. In the former case there is but one watch in the world which the seller could tender in performance of his contract; in the latter case there might be any number of watches in existence which would conform to the terms of the agreement, and if the time of delivery was far enough in the future, watches not in existence at the time the contract was made might be manufactured, any one of which might be offered to the buyer at the proper time in performance of the contract.

PRICE.

5. The Price is the consideration for a contract of sale.

A transfer of goods without consideration is a Gift.

A transfer of goods for other goods received in return without any value being fixed is an Exchange.

The consideration for a sale is sufficient if the price be merely promised.

The parties may agree that the price is to be determined in some specified manner, as that it shall be fixed by—

Future market quotations.

The amount obtained by the buyer on a resale.

A third person.

In the absence of express agreement in regard to the price, it may be determined by a former course of dealing between the parties; or, if none, the law will imply an agreement to pay a reasonable price.

The consideration for a contract of sale is known as the "price."

The absence of consideration is one of the distinctions between a sale and a gift. Another distinction is that immediate delivery of the subject-matter is essential to the validity of a gift, while delivery of the subject-matter of a sale may be, and very frequently is, postponed. Growing out of these two primary distinctions are some secondary ones, as that the donor (the one making a gift) is not liable to the donee (the one to whom it is made) if the donor does not have title to the article given. If the donor gives away so much of his property as not to have enough left to satisfy his creditors, they can take the gift from the donee although the latter acted in good faith; whereas a sale of property to one buying in good faith would be valid under such circumstances. A promise to make a gift in the future is void, while a promise to make a future sale is valid.

The price must be in money terms, otherwise the transaction would be an Exchange or Barter. If *A* owns horses and *B* owns cows, and *A* gives a horse for two of *B*'s cows without placing any value on them, an exchange would result; but if *A* values his horse at thirty dollars, and *B* values his cows at fifteen dollars each, and the deal is made on that basis, the transaction would be two sales made concurrently, dispensing with actual payment of money, but the parties are in the same position as if the transfers had been made at different times with payment made each time. The distinction between a sale and an exchange is purely technical, most of the rules applying to sales also applying to exchanges. Criminal statutes forbidding sales of certain

articles, as intoxicating liquors, generally are held to include exchanges involving such articles.

A sale is valid although the parties agree that payment of the price or of any part of it is not to be made immediately, but is partly or wholly promised to be paid in the future, known as a sale on credit.

It is proper for the parties to agree that the price is to be based on the market-quotations at a future time at a specified place (See Appendix C, Case No. 1); or that the price is to be determined by the amount obtained by the buyer at a subsequent sale by him, as that the buyer, after reselling, is to pay the seller all the buyer received over a certain amount. The parties, feeling incompetent to fix the value of the article sold, might agree that the amount to be paid should be fixed by some designated third person, in which case his decision, made in good faith, would be binding. Should he refuse to name a price, a contract would not be effected, the terms of sale being incomplete; but if, previous to his refusal, the goods have been delivered and, for some reason, cannot be returned by the buyer, a contract would result, the price being the reasonable value of the goods. (See Appendix A, Uniform Sales Act, §10.)

In many cases a contract is made without anything whatever being said in regard to the price. If the parties have had previous dealings at a fixed price, and goods of a similar kind subsequently are ordered without any price being designated, it will be implied that the former price was to be paid. [See Appendix A, Uniform Sales Act, §9(1).]

If there has not been any course of dealing sufficient to fix the price, the law then implies a promise by the buyer to pay a reasonable amount, usually being the market-price at the time of delivery, unless the market-price is shown to be unnaturally inflated or depressed. (See Appendix C, Case No. 2.)

If the parties have agreed upon the basis of computing the price, but, owing to some contingency, it becomes impossible to ascertain the exact amount to be paid, and the goods have been delivered to the buyer under such circumstances that he has become their owner and, without any fault on his part, he is unable to return them, and the matter is brought into court, it is the duty of the jury to fix the amount as nearly as they can; as where sugar was sold at a designated price per pound, and a quantity delivered to the buyer had been destroyed before it could be weighed to ascertain the exact amount to be paid.

In those cases where the amount to be paid has not been fixed expressly, the law regards the price as sufficiently certain, it being an application of the maxim, *Id certum est quod certum reddi potest* (Latin, that is certain which can be made certain).

GENUINE CONSENT—LEGALITY OF OBJECT.

6. A sale must be free from mistake and from illegality.

As in the case of any contract, a sale requires mutual and genuine consent, which would be lacking if mistake of fact should occur. Mistake may relate to the identity of the parties, to the existence or to the identity of the subject-matter, to the price or to other terms; and as there never has been any agreement there is no contract. (See Contracts, Case No. 35.) If goods have been delivered as the result of mistake, they can be reclaimed, even from one who has taken them for value and in good faith, unless there has been an unreasonable delay after discovery of the mistake.

Where *X*, a swindler impersonating *B*, goes through the form of purchasing goods from *A*, *A* never loses his title to the goods, as there never was any meeting of the minds between him and anyone else. *A* had no intention of selling to *X* but to *B*; and as *B* was in entire ignorance of the matter, there was no agreement with him, so he did not acquire any title. If *X* obtains possession of the goods before discovery of his fraud, and transfers them for value

to *Y* who acts in good faith, *A* can retake the goods from *Y*, as *X*, not having any title, could not give *Y* any title.

If an order for goods be given to one person, another person has no right to fill it, even though the latter is the successor in business of the person from whom the goods were ordered who is no longer in business. (See Appendix C, Case No. 3.)

If goods perish before agreement as to their sale is reached, there is no contract. (See Appendix A, Uniform Sales Act, §7.) If the goods consist of particular articles which each party had in mind, and are in existence at the time the contract is made but perish before delivery to the buyer without the fault of the seller, this is not mistake and a contract is made, though the seller is excused from performance of his contract because of impossibility. (See Appendix A, Uniform Sales Act, §8.) The seller cannot be required to deliver, nor the buyer to accept, an equivalent.

A sale is not made if the seller has one thing in mind and the buyer another (see Contracts, Case No. 35); and, still more, a sale is not made of articles which neither party had in mind. (See Appendix C, Case No. 4.) Thus, a sale of a desk would not transfer the ownership of articles in the desk although each party was unaware of their presence therein.

A sale might be made of articles which were not contemplated either by the seller or by the buyer if their contract is comprehensive enough to include them. Thus, where a contract was made of all of the property left by the seller's deceased mother, without any reservation, it transfers title to jewelry placed in the mother's tomb, which had been hers, though it was expected the jewelry would remain there and probably would have remained there had it not been stolen.

To invalidate an agreement, mistake must go to its root. Both parties might be mistaken in the popular sense of the

word, yet a valid contract would result if they intended to do what actually was done. Thus, a sale of an uncut stone—a diamond worth $700, by a woman to a jeweler for one dollar, would be valid if each party was ignorant of its character.

Illegality may relate to the parties, to the subject-matter, to the time of making the agreement, to the time of delivery of the goods, or to the place. Thus, a valid sale cannot be made of a human being; a soldier cannot sell his uniform; game in some States cannot be sold during certain seasons, nor intoxicating liquors in certain places or during certain hours; and certain articles cannot be sold to minors, or to Indians. In some States an agreement made on Sunday is illegal. An agreement may be illegal because of the disposition to be made of the subject-matter; as where goods are bought under an agreement that they are to be smuggled into the country by the seller. If illegality be present, the seller cannot recover either the price or any goods which he may have delivered; nor can the buyer, who has paid the price, recover the goods or the price.

In most States, by statute, it is a criminal offense to sell mortgaged goods without either the written consent of the mortgagee, or giving information to the buyer of the existence of the mortgage; but both such acts are not required. In any event the transfer is not necessarily invalid as between the seller and buyer.

CLASSIFICATION.

7. Sales may be—

Executory and Executed.

Absolute, Conditional and Contingent.

An Executory sale is one in which the ownership of the subject-matter has not passed to the buyer.

An Executed sale is one in which the ownership of the subject-matter has passed to the buyer.

An executed sale cannot be made of goods not possessing either an actual or a potential existence; nor unless they are in the actual or constructive possession of the seller.

Potential existence is that possessed by things which, though not at present in actual existence, reasonably may be expected to exist in the future as the produce or result of something in actual existence and within the control of the party contracting with reference to it.

An Absolute sale is one free from unperformed conditions and contingencies.

A Conditional sale is one in which conditions, either precedent, concurrent, or subsequent, are to be, or may be performed by one or by both of the parties, such performance affecting their rights.

A Contingent sale is one in which the rights of the parties may be affected by the happening or not happening of some event beyond the immediate control of the party affected thereby.

Sales may be classified in various ways. One of the most important classifications is into executory and executed sales. An Executory sale is one in which the ownership of the subject-matter has not passed to the buyer; while an Executed sale is one in which such ownership has passed to the buyer. An executory sale is also known as an Agreement to Sell, and will change into an executed sale the instant the ownership passes. A Bargain and Sale is one in which the ownership is transferred immediately as the result of the negotiations of the parties, being an executed sale just as soon as the contract is made.

All through this subject it is most important for the student to bear in mind that transfer of ownership, delivery of the subject-matter, and payment of the price are three

distinct and independent matters. Any one or two of them may occur without the others or other, though frequently one of them may affect the others in some way, as will be seen later. The student is also likely to be confused further by the fact that in the classification of sales into executory and executed, "sale" means a transfer of ownership; the classification does not relate to "sale" as a contract. It will be recalled that an ordinary contract remains "executory" as long as any of its terms are not performed, becoming fully "executed" only after complete performance of all of its terms. Thus, *A* makes a contract to sell to *B* one thousand chairs which *A* is to order from a manufacturer and to send to *B*, and *B* pays for them at the time he orders them. As a sale, it is executory, because there are no particular chairs whose ownership has passed to *B*. Later, *A* acquires one thousand chairs, and *B* calls and accepts them. At the instant *B* accepts the chairs the ownership passes and they become his and the sale is executed. The previous payment of the price by *B* and the fact that *A* is yet to send the chairs to *B* does not affect the question of ownership. Although the *sale* became executed at the instant ownership in the chairs passed to *B*, the *contract* remains executory on *A's* part until he has fully performed it by sending the chairs.

It is evident that there cannot be an executed sale unless the subject-matter is in existence and belongs to the seller, as an executed sale is one in which ownership has passed to the buyer, and ownership which does not exist in the seller cannot pass. In all cases, then, where the seller is to manufacture or subsequently to acquire the goods, the sale necessarily is executory. Thus, where a fisherman is about to embark on an expedition, he cannot make an executed sale of the fish which he expects to catch and ultimately does catch on that expedition, though there could be an executory

sale of such fish. The point would become important if the buyer had paid for the fish, and the seller became bankrupt before any fish were delivered. If the sale had been an executed one, the buyer would have ownership of the fish as caught, and, hence, would be entitled to their possession, thus losing nothing; but as it is, he does not own the fish but merely has a claim against a bankrupt based on an executory sale of fish, and such claim might be practically worthless. Goods to be manufactured or to be acquired by the seller are "future" goods. (See Appendix A, Uniform Sales Act, §76.)

The existence of goods, so as to be the subject of an executed sale, may be either actual or potential. Actual existence occurs where the goods exist in fact, and are under the actual or constructive control of the seller. Potential existence is that possessed by things which reasonably may be expected to exist as the produce or result of something in actual existence and within the control of the party contracting in reference to it. (See Appendix C, Case No. 5.) Thus, wool to be grown on sheep has a potential existence and may be the subject of an executed sale if the seller, at the time of his contract, is in possession of the sheep upon which the wool sold is to grow and he would own the wool as it grew; but a person could not make an executed sale of a crop of grain to be grown on land to which he has no present right of possession, although he buys or leases the land the next day, enters into immediate possession and raises a crop. In many States a person having possession of land can make a present sale of crops to be grown during a number of years in the future; but in some States, future crops do not have a potential existence except such as are to be raised during the next succeeding year after the contract is made; and in a few States a crop does not have a potential existence until the seed is planted.

The mere fact that the article sold is not in the immediate possession of the seller will not make a contract executory if the seller has a present right to possession. Thus, the sale of an animal which had strayed is executed and passes immediate ownership to the buyer; it is not a contract for future delivery although the buyer took the chance of finding it. Likewise, an executed sale can be made of an article which is in the possession of a bailee of the seller. A person might hire a machine for several months and be entitled to its possession and control during that time, but that would not prevent the owner from making an executed sale of the machine subject, however, to the rights of the bailee. The owner, in these cases, has constructive possession, that is, he has possession in contemplation of law.

It does not follow that possession by the seller at the time of the sale, of the article sold, always makes the sale an executed one. Under the agreement between the parties the ownership might not pass until a future time, in which case the sale would be executory.

The tense of the verb used in a written contract is not conclusive of the intention of the parties, as such intention must be gathered from the whole instrument. A statement that *A* "sells" or "has sold" and that *B* "buys" or "has bought" would *prima facie* indicate an executed sale; and a statement that *A* "will sell" or "agrees to sell" and that *B* "will buy" or "agrees to buy," would *prima facie* indicate an executory contract, but other provisions in the contract might indicate clearly that the former was an executory and the latter an executed sale.

A sale may be absolute, conditional, or contingent. An Absolute sale is one free from unperformed conditions and contingencies, most sales being absolute. A Conditional sale is one in which conditions are to be performed by one or by both of the parties, such usually relating to the transfer

of ownership; and they may be precedent, concurrent, or subsequent. A Condition Precedent is one which must be performed before the ownership passes to the buyer. Concurrent Conditions are those to be performed by the parties at the same time. A Condition Subsequent is one whose performance affects rights previously acquired. The most common condition precedent is that the buyer must pay the price before he can acquire ownership, although he has been placed in possession of the goods and it is the supposition that he will retain them and his use of them will be inconsistent with the idea of a return. Thus where ranges, delivered to a buyer, are firmly attached to his realty, a reservation of ownership by the seller until full payment of the price is valid, at least between the parties.

A condition must result from agreement. A seller cannot make a sale conditional by a mere mental reservation of title. Upon performance or upon a tender of performance of all conditions precedent the sale becomes absolute. Thus, if payment of the price by the buyer was the condition whose performance was precedent to the transfer of ownership to the buyer, it is removed as soon as the buyer makes a legal tender of the price although not accepted by the seller.

Sometimes a seller is given an option to repurchase the article sold, which would be a sale subject to a condition subsequent; but such option must be exercised within the time limited or it will be lost. When exercised, the subsequent transaction is an independent one requiring the same acts as if a resale was made to a third person. If, before the option has been exercised and before the time limit has expired, third persons with notice acquire interests in the goods, their rights will be subject to the seller's option.

A chattel mortgage is technically a sale of goods to one having a right to claim performance of some duty from the seller, such as the payment of a debt, with a condition

subsequent that if the duty is performed by the seller as agreed, the title to the goods so transferred will revest in the seller; but many of the rules governing mortgages do not apply to sales. (See Appendix A, Uniform Sales Act, §75.) The subject of mortgages will appear in a later volume.

A Contingent sale is one in which the rights of the parties are affected by the happening or not happening of some event beyond the immediate control of the party affected. Being similar to conditional sales they are treated as such.

Where goods are consigned by a manufacturer to an agent under an agreement that the agent is to be regarded as a buyer from the manufacturer if and when the agent finds a customer, a sale to the agent would be contingent upon a customer appearing.

If goods be delivered under an option to buy, known as a sale "on approval" or "on trial," the ownership remains in the seller until the buyer exercises his option either expressly or by retaining the goods without objection for so long a time as impliedly to indicate approval. If, however, the ownership passes to the buyer with the privilege of returning them if not satisfied, the transaction is known as a "sale or return." If the buyer, without any notice to the seller, retain the goods after the time designated in the contract, or if a time has not been designated, after the expiration of a reasonable time, his option is gone. A sale on approval involves a condition precedent, while a sale or return illustrates a condition subsequent. In the former the buyer is a bailee prior to the approval. (See Appendix C, Case No. 6.)

If goods are to be manufactured under an express agreement that they shall be satisfactory to the buyer, he is not required to take them if, acting in good faith, he is not sat-

isfied and personal taste is involved, as would be the case if the article was a portrait, or clothing.

Conditions and contingencies may be implied by law. Thus, where a farmer makes a contract to sell a crop and to deliver it, when harvested, on board a car to be furnished by the buyer, there is an implied condition, first, that the farmer shall notify the buyer when the crop is ready for delivery, and, second, that the buyer shall notify the farmer when the car is ready to be loaded. Contingencies are also implied in "sales to arrive." (See Appendix C, Case No. 7.) If a sale be made of goods to arrive by a certain vessel, it is construed to mean, "if the goods shall arrive" and not, "which I agree shall arrive," unless the language used indicated that the latter meaning was intended. Generally, if the vessel arrives without the goods, there is no sale, as the contingency does not happen. Where a sale was made of two hundred tons of potatoes "grown on land belonging to said Robert Coupland in Whaplode," and such land ordinarily produced more than that amount, the contract contained an implied contingency that the land would produce that amount; and as there were but eighty tons raised that season, owing to blight, the seller was not liable for failure to deliver more. It would have been otherwise, however, if the contract had called for merely two hundred tons of potatoes without specifying where they were to be grown, although each party might have expected they would be raised on that particular tract.

If performance of a condition by one party be prevented by the other, the latter cannot take advantage of such non-performance. Thus, where a monument was sold and the seller was to inscribe thereon four lines of verse to be supplied by the buyer, but the buyer failed to supply the verse, the seller could recover the price less the cost of making such inscription.

Conditions and contingencies may be expressly or impliedly waived by the party to be benefited by them. They will be waived impliedly by acceptance of defective performance with knowledge of the defect. A waiver is some evidence of an intention to regard the defective performance as sufficient under the contract, though it generally does not interfere with the right of the party to claim damages for an injury resulting from the incomplete performance. It is good business on the part of the buyer to call the attention of the seller to any defects as soon as known; and, if the goods are retained, to give prompt notice that the seller will be held liable for such defective performance.

There are other classifications of sales, but only two of them will be noticed here, the rest being beyond the scope of this work.

Sales may be private or public. A Private sale is one resulting from negotiations confined to the seller and buyer. A Public sale is one made at auction to the highest bidder.

An auction consists in inviting offers from those present, for something placed on sale. An offer, when made, is accepted, making the sale complete, when the hammer falls or by such other act as may be adopted to indicate acceptance. Prior to acceptance a bid may be revoked. [See Appendix A, Uniform Sales Act, §21(2).]

Sales are voluntary or forced. A Voluntary sale is one made without compulsion or with permission from the owner of the goods. A Forced or involuntary sale is one made under circumstances not allowing of delay and usually against the wish of the owner of the goods, preventing him from securing an advantageous price and terms. Sales made through one acting in an official or in a representative capacity, as a sheriff or as a mortgagee, usually are forced ones.

CHAPTER II.

FORM OF THE CONTRACT.

8. Formality.
9. Statute of Frauds—Enactment.
10. Statute of Frauds—Contracts Within.
11. Statute of Frauds—Price.
12. Statute of Frauds—Acceptance and Receipt.
13. Statute of Frauds—Part Payment.
14. Statute of Frauds—Memorandum.

FORMALITY.

8. **Aside from statutes, a sale may be express or may be implied from acts. If express, it may be written or oral. If written, it may be under seal or not under seal.**

A Bill of Sale is a written contract of sale.

The common law did not require any formality in a sale; and most sales are very informal. A sale can be implied from conduct; as where goods are sent, without any previous order, to one who receives and retains them without objection, knowing that payment therefor is expected. (See Contracts, Case No. 3.)

The parties sometimes reduce their contract to writing, this instrument being known as a Bill of Sale, and usually being under seal. (For the form of a bill of sale, see Appendix B, Form No. 1.) Where third persons are likely to question the rights of the buyer, a bill of sale is very desirable; and statutes in most States provide for filing bills of sale with some public officer so that the records will give constructive notice to everyone of the buyer's rights. Such

statutes usually prescribe certain formalities to be observed, as that the instrument must be acknowledged before some magistrate. By act of Congress the transfer of certain vessels must be by bill of sale. If the vessel is at sea such an instrument sometimes is designated as a Grand Bill of Sale.

Unless required by some statute, a bill of sale may be very inartificially drawn, if the intention be clearly shown; but, as in the case of any written contract, delivery is required. The document should contain the names of the parties, the price and when it is payable, a description of the property sold, and all other terms of the agreement not implied by law, as the general rule is that a written contract cannot be added to or varied by oral evidence. It can be shown, however, that an apparently absolute transfer of title was in reality given merely as security for the payment of some debt or for the performance of some other duty, in which case it will be treated as a chattel mortgage.

As between the parties any description of the property suffices if they understand what is intended to be sold; but to affect the rights of third persons, care must be exercised to describe the property sufficiently to identify it or to suggest inquiry leading to its identification, especially if the ownership of the article is in one party and its possession is with the other. The description should be as complete as that required in a chattel mortgage. Thus, describing the property as "a horse" would not be sufficient to indicate to third persons what was sold if the seller had several horses in different places. An animal should be described by species, sex, age, color, weight, name and where kept, if possible.

STATUTE OF FRAUDS—ENACTMENT.

9. **The seventeenth section of the British Statute of Frauds provided that—**

2. Written contract [illegible]
3. Part of only matter delivered and accepted
4. Part of price delivered & accepted

> "No contract for the sale of any goods, wares or merchandise for the price of ten pounds sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

This section has been substantially re-enacted in most of the States of this country.

Prior to the year 1677 an oral contract of sale was as enforceable as a written one; but, in making an oral contract, it is easy for the parties to misunderstand each other, or, if the terms are fully understood, memories are faulty and the terms are forgotten. Dishonest persons, too, can distort what was said at the time the oral agreement was reached; and, if willing to perjure themselves, can testify to statements which never were made, or that statements which were in fact made were not made. Even an honest person will, in time, persuade himself that the agreement was as his later interests make it desirable that it should be. To remedy these evils, the British Parliament passed an act requiring certain contracts to be evidenced by a writing. There were several sections to this act, the seventeenth relating to sales of goods. This section has been re-enacted in substance by most of the States in this country. In the few States which do not have any statutory provision on this point, an oral contract, of course, can be enforced as well as a written one. As the wording of the statutes in the different States is not the same, and as the supreme courts of those States have reached different conclusions in their constructions of such statutes, even where the provisions are

similar, general rules only can be given here, and they may not apply in some States. (See Appendix A, Uniform Sales Act, §4.)

STATUTE OF FRAUDS—CONTRACTS WITHIN.

10. "Goods, wares and merchandise" means articles of personal property which are subject to common barter and sale.

The Statute does not apply to contracts for work and labor.

The Statute governs both executory and executed sales.

The question as to the meaning of "goods, wares and merchandise" in the Statute has been quite troublesome. "Goods," primarily, includes inanimate objects only. "Wares" means something to be sold and is equivalent to "merchandise," meaning whatever usually is bought and sold in trade or in market or by merchants, being objects of commerce and including live animals. The terms combined are more comprehensive than any of them used alone, meaning articles of personal property which are subjects of common barter and sale. Crops, whether mature or not, which result from annual labor, are generally held to be included in this phrase. The statutes in some States use broader terms than the British one, or expressly state what articles are within the statute. [See Appendix A, Uniform Sales Act, §4(1).]

A distinction is made between sales and contracts for work and labor, the Statute not applying to the latter; but the difficulty is in determining where the dividing line between the two is to be drawn. If *A* agrees to manufacture a wagon for *B*, is this a sale of the wagon or is it merely a contract of employment? In most States if a contract is made for the sale of an article of a kind in which the seller

deals, the Statute applies although the seller is to manufacture this particular article. [See Appendix A, Uniform Sales Act, §4(2).] In some States any goods to be manufactured are not within the Statute; while in a few jurisdictions contracts for the manufacture of an article for the person ordering it, whether such articles are sold by the seller in the course of his business or not, are treated as sales and within the Statute.

A provision in a contract of sale that the seller may repurchase the goods sold is not regarded as an independent contract, so that if the original contract complies with the Statute, the agreement to repurchase is enforceable.

Executory as well as executed sales are within the Statute. [See Appendix A, Uniform Sales Act, §4(2).]

STATUTE OF FRAUDS—PRICE.

11. Oral contracts of sale are enforceable if the price of the goods is under the amount named in the Statute of Frauds.

There are four instances in which the Statute of Frauds allows an oral contract of sale to be enforceable. First, where the price is under the amount specified; second, where there is acceptance and receipt of part of the goods; third, where something is given in earnest or in part payment; and, fourth, where a memorandum of the oral contract is made and signed by the party sought to be charged.

The amount named in the British statute, above which the Statute applied, is approximately fifty dollars, and that is the amount appearing in many statutes in this country. In other States the amount varies from thirty dollars to two thousand, five hundred dollars.

In Arkansas, Maine, and Missouri the amount is $30; New Hampshire, $33; Vermont, $40; California, Idaho,

Montana, and Utah, $200. In Florida a limit is not named. The Uniform Sales Act, §4, places the amount at $500; but this has been reduced in Connecticut to $100, while in Ohio it has been increased to $2,500.

If the total value of all the goods bargained for in one oral contract exceeds that named in the Statute, the contract is not enforceable notwithstanding a separate price, less than the statutory amount, is fixed on each article so that the same result would have been accomplished if the parties had made independent contracts for each article; that is, the fact that the agreement was severable does not prevent the evil from arising which the Statute was intended to prevent. Likewise, if delivery is to be made in installments to be paid for separately, and the amount to be paid for each installment is under the statutory value, the contract is within the Statute if the total amount to be paid exceeds that named in the Statute.

STATUTE OF FRAUDS—ACCEPTANCE AND RECEIPT.

12. Oral contracts of sale to any amount are enforceable under the Statute of Frauds if the buyer accept and receive part of the goods.

Acceptance of goods by the buyer may be—

- **Express.**
- **Implied—**
  - **By exercising any act of ownership over them.**
  - **By retaining them an unreasonable time, having a right to reject them.**

The buyer, after rightfully rejecting goods and notifying the seller of such rejection, is under no duty to send the goods to the seller unless there was an agreement to that effect.

As the theory of the Statute of Frauds was to prevent the enforcement of alleged agreements which never had been made, it is evident that the parties could not consistently deny the existence of a contract if their acts indicated that one had been made. Hence, acceptance and receipt of goods by the buyer is such strong evidence that a contract really was entered into, that the Statute allows oral evidence of such contract. (See Appendix C, Cases No. 8 and 9.)

Acceptance and receipt are two distinct requirements. Either may take place before the other; and one might occur without the other. (See Appendix C, Case No. 11.) Acceptance cannot be given, however, until the goods have been identified and delivered, and consists of assent by the buyer to assume ownership over all or a part of the goods. (See Appendix C, Case No. 17.) Assent may be express, or it may be implied from acts inconsistent with lack of ownership in the buyer. [See Appendix A, Uniform Sales Act, §4(3).] Acts of ownership indicating acceptance by the buyer would be using, reselling or attempting to resell the goods, mortgaging or pledging them or the documentary evidence representing them, refusing to surrender them, changing their form, insuring them as his own, or having them permanently marked with his name, as silverware. If the buyer has a right to reject the goods, his acceptance will be implied if, within a reasonable time, he does not notify the seller of such rejection. Rejection need not be formal, anything indicating to the seller that the goods are not wanted will suffice; and, unless he has agreed to do so, the buyer is not under any duty to send the rejected goods to the seller. (See Appendix A, Uniform Sales Act, §50.) (See, also, Appendix C, Case No. 17.) If two or more buy jointly, all must accept in order to satisfy the Statute.

As the Statute is satisfied by the acceptance and receipt of a "part" of the goods, it is immaterial how small that

part is, provided it diminishes the quantity, unless it is a mere sample. It is essential, however, that what is accepted and received be taken by the buyer as a part; for if, at the time he accepts and receives a portion, he expressly repudiates the agreement as to the remainder, the Statute is not satisfied. (See Appendix C, Case No. 10.)

STATUTE OF FRAUDS—PART PAYMENT.

13. Oral contracts of sale to any amount are enforceable under the Statute of Frauds if the buyer makes part payment of the price.

The part payment required by the Statute of Frauds may be made in property, or by the note of a third person taken as absolute payment. It may be made by the use of property, as where use was made of sacks delivered by the buyer to the seller to transport corn—the subject-matter of the sale, and a charge for such use was to be deducted from the price. Part payment may likewise be made in services, as where the buyer hired men to bale hay—the subject-matter of the contract. Payment made by the buyer to a third person will be sufficient if in accordance with an agreement with the seller; but a tender of payment to the seller, though legal, is not a compliance with the Statute. (See Appendix C, Case No. 10.)

Part payment at any time before suit is brought is sufficient, unless the Statute requires such payment to be made "at the time" the contract is entered into, as is the case in a few States.

In former times "earnest" was a trifling sum paid to bind the bargain, and was not regarded as a part of the price; but in modern times earnest has become synonymous with part payment.

STATUTE OF FRAUDS—MEMORANDUM.

14. The memorandum required by the Statute of Frauds should contain the names or descriptions of the parties, the capacity in which they act, the subject-matter of the sale, and all of the terms expressly agreed upon. Otherwise, it may be very informal.

The memorandum may be made at any time before suit is brought; and generally it is sufficient if it is signed by the party who neglects or refuses to perform the agreement. Anything intended as a signature ordinarily will suffice.

Lack of any memorandum of a sale does not necessarily make the agreement void but merely unenforceable in court.

The "note or memorandum" required by the Statute of Frauds may be made at any time before suit is brought, or even before the bargain is completed, as in the case of a written offer; and it may be very informal. It has even been held that a letter repudiating but not denying the agreement and stating its terms is a sufficient memorandum. Likewise a letter written to another person has been held to be sufficient. The memorandum, however, should contain all the terms of the agreement, including the names or descriptions of the parties, the subject-matter, the price and terms of credit if any have been agreed upon, and the time and place of delivery if selected (See Appendix C, Cases No. 11 and 12); but as the memorandum is not required to be any more definite than the actual contract, terms implied by law need not be stated. (For a form of a memorandum of sale, see Appendix B, Form No. 2.) Merely stating the names of the parties in the memorandum will not be sufficient if there is no indication which one of them is the seller and which is the buyer. Thus, "Sold Huguet,

for J. Ogden & Co." does not indicate on its face whether Huguet sold to Ogden & Co. as was claimed, or whether the sale was to Huguet for Ogden & Co. as sellers. If the names of the parties as stated are fictitious merely, oral evidence may be given to identify them.

The liberality of the law as to what constitutes a signature applies to the memorandum required by the Statute of Frauds. Generally anything intended as a signature by a party will suffice. It may consist of a mark or of initials, or be a part only of the name. It may be written, stamped, or printed; and it may appear at any place in the memorandum. (See Appendix C, Case No. 12.) Even a name printed on a letter-head has been held to have been adopted as a signature, and to be sufficient. Some statutes require the memorandum to be subscribed (written under), in which case it must appear at the end, without any unsigned additions thereafter.

The signature must be that of the "parties to be charged," that is, it is generally held to be sufficient if the memorandum was signed by the party against whom suit is brought, whether he be the seller or the buyer. Thus, a written offer orally accepted would, in most jurisdictions, make the seller liable, although the buyer could not be held on his oral acceptance.

The Statute expressly provides that the signature may be made by a lawfully authorized agent. One person may act as the agent of both parties (See Appendix C, Case No. 12), as an auctioneer; but one party cannot act as agent for the other, as that would hold out a temptation to commit fraud—the very thing the Statute was intended to prevent.

The Statute is regarded as not making an oral agreement void but unenforceable merely, that is, a court will not allow its terms to be shown.

CHAPTER III.

CONDITIONS AND WARRANTIES.

15. Definitions.
16. Warranties—Kinds.
17. Warranties—Express—Classification.
18. Caveat Emptor.
19. Warranties—Implied—Definition.
20. Warranties—Implied—Title—Quiet Possession.
21. Warranties—Implied—Incumbrances.
22. Warranties—Implied—Quality.
23. Warranties—Implied—Sample—Description.
24. Warranties—Implied Cannot Negative Express.

DEFINITIONS.

15. A Condition, in its narrow sense, is an express or an implied representation by the seller that certain material facts do or do not, or will or will not exist, or have or have not existed; and its falsity will justify the buyer who relied thereon in a refusal to accept what is tendered in performance of the contract.

A Warranty, in its narrow sense, is a representation by the seller, which, although a part of the contract of sale, is collateral to the transfer of title, and a breach thereof gives rise to a claim for damages only, and does not generally entitle the buyer to reject the goods tendered by the seller.

During the negotiations which precede a sale, statements frequently are made, either voluntarily or in response to inquiries, or the circumstances justify the parties in supposing that certain facts do or do not exist, will or will not

exist, or have or have not existed, or that certain acts have or have not been done, or will or will not be done. Such statements and suppositions are known as conditions or warranties.

The words "condition" and "warranty" frequently are used synonymously; but each has a narrow and proper meaning, though difficult to be defined. A Condition is said to be a representation by the seller that certain material facts in regard to the subject-matter do or do not, or will or will not exist, or have or have not existed, justifying the buyer in a refusal to accept what is offered in performance of the contract if such representation is not true and he has relied thereon in reaching the agreement. If the condition is not performed, the article is not what the buyer agreed to accept. Thus, the buyer of a pianola-piano can reject a piano delivered by the seller which is not a pianola-piano, although worth the price paid, for it does not comply with the condition on which the contract was entered into.

A Warranty, in its narrow and strict sense, is a representation by the seller which is collateral to the transfer of title, though a part of the contract of sale, whose falsity gives the buyer a claim for damages but generally does not give him a right to reject the goods.

A condition and a warranty are each a part of the contract of sale; but a condition goes right to the essence of the contract—the transfer of ownership, while a warranty is collateral to the transfer of ownership.

It frequently is very difficult to determine whether a stipulation in a contract of sale is a condition or a warranty, using these terms in their narrow and proper sense; and this uncertainty has been the cause of much litigation, for if the goods tendered by the seller are not just what the buyer expected, the latter naturally does not want to accept them. If the stipulation is a condition in its narrow sense, the buyer

would have the right to reject the goods; but if it is a warranty proper, the buyer, in most jurisdictions, must accept the goods though not what he expected, his remedy being merely a claim for damages for a breach of the warranty. If the parties have expressly agreed that the buyer may refuse the goods if they do not fulfill the warranty, such express agreement, of course, will prevail.

A breach of a condition may be waived by the buyer, who may accept the goods and treat the condition as a warranty, with all the rights which would accrue to him from a breach of warranty. (See Appendix A, Uniform Sales Act, §§11, 49.) Thus, if a contract calls for "good, clear, merchantable ice" and the ice tendered by the seller, not corresponding to such description, would justify the buyer in rejecting it, he can accept the ice, treat the condition as a warranty that the ice would be good, clear and merchantable, and claim damages for its breach.

Acceptance of defective goods without objection from the buyer at the time might be some evidence of a complete waiver of the defects; but unless there is unreasonable delay the buyer can rely on his warranty. (See Appendix C, Case No. 17.) It is safer for the buyer to give prompt notice of any defects in the goods, and of his intention to hold the seller liable therefor.

WARRANTIES—KINDS.

16. Warranties are express or implied.

An Express Warranty is an affirmation of fact or a promise declared in words by the seller, relating to the goods and tending to induce a purchase.

A statement purporting to be an expression of opinion is not a warranty.

There is no liability if the seller's representation is not relied upon by the buyer.

Warranties are classified as express and implied. An Express warranty is one made by the seller in direct and positive terms. It is valid although informal and ungrammatical; nor need the words "warrant" or "warranty" be used, as a warranty will be made if the intention to give one is clear, even though incorrect terms have been used. In popular language a warranty is called a "guaranty," though legally, a guaranty is something different, as will be noted in a later volume. The seller cannot escape liability by claiming that he did not have any intention of conveying the impression obtained by the buyer, if third persons generally would be justified in reaching the same conclusion as the buyer. (See Appendix C, Case No. 15.) Fraud does not enter into the question of warranties at all. A seller might make a false statement knowingly or he might make it honestly. The first would be fraudulent, and the latter not; but in each case the statement was untrue and the buyer is injured in the latter case as much as he was in the former. If the warranty was fraudulent, the buyer would have, in addition to his claim for breach of warranty, all the rights given to any defrauded party to a contract, if he chose to assert them. A positive statement by the seller during negotiations for the sale of a team of horses that, "I guarantee them hosses is all right," would justify the buyer in supposing that the seller meant, "I warrant these horses to be sound"; and it would be no defense to the seller that he believed that the horses were sound.

Not all representations made by a seller become warranties. Untrue statements of fact made by the seller to the buyer before their negotiations were begun and which were not designed to become terms in a future contract relating to the subject-matter do not become warranties merely because the parties subsequently happen to enter into a contract, although a remembrance of such former statements

may remain in the buyer's mind. If the buyer wished to rely on them he should have referred to them after negotiations were begun. Statements made during negotiations do not become warranties if the agreement ultimately reached was that the sale was to be made without warranties. A warranty given after a contract of sale is complete, although given positively, is based on a past consideration, and is invalid.

A warranty must relate to facts; hence a statement of opinion, though false, made at any time, will not amount to a warranty. (See Appendix A, Uniform Sales Act, §12.) A certain amount of praise of his goods is allowed to a seller without any liability on his part, being known as "puffing" or "dealer's talk." Statements as to value, or that the article is "fine," "nice," "choice," "good," and similar expressions, are regarded as matters of opinion; in any event, they are so common that buyers should not rely upon them.

Statements as to material facts made by the seller at any time do not give the buyer any right of action if he has not relied upon them; but it is sufficient if the buyer would not have purchased if the statement had not been made. Thus, if a buyer of an animal had doubts whether it was sound, but would not have bought except for a warranty of soundness, he has relied on the warranty, and the seller would be liable if the animal was unsound.

WARRANTIES—EXPRESS—CLASSIFICATION.

17. Express warranties may be—
General or special.
Absolute or conditional.
Written or oral.

Most warranties are General, that is, not restricted in their application to a particular point; but some warranties

are Special, that is, limited to some particular matter. A warranty that a horse is sound would be general; while a warranty that it did not have some designated disease would be special. If the seller has given a special warranty only, he cannot be held liable beyond its express terms. Even a general warranty will not cover a patent defect if the buyer examined the article sold, and might reasonably be supposed to have observed it, unless the defect be one requiring special skill to recognize it, and such was not possessed by the buyer. Thus, a warranty that a horse is sound would not be broken because the horse lacked an ear, if the horse was present and the absence of an ear would be noticeable to even a casual observer. This is an application of the rule that a representation, to become a warranty, must be relied upon by the buyer, and he cannot justly claim, in this case, that he relied upon the seller's statement as a representation that the horse had two ears. As a matter of good business it would be better, in such cases, for the seller to mention visible defects and to except them from his warranty. If the horse had a disease which would be very apparent to a veterinary surgeon but not to one not possessing a knowledge of horses, the defect might be patent as to the former but not to the latter person, who could claim reliance on a warranty of soundness given by the seller.

Most warranties are Absolute, that is, without any limitations; but some warranties are Conditional, that is, have certain terms annexed which must be performed before there can be any breach thereof. A conditional warranty frequently made in the sale of machinery is that the buyer shall test it at once, promptly notify the seller of any defects, and afford the seller an opportunity of remedying them.

If a contract of sale be fully reduced to writing, an oral warranty cannot be shown, under the rule that oral evidence cannot be received to vary a written contract; but if

the writing was not intended as a complete contract, such as a receipt, oral warranties can be shown. Likewise, an oral warranty can be shown if the seller, taking advantage of the illiteracy of the buyer, should give the latter a written warranty different from the oral one; or if, without the knowledge of the buyer, a written warranty is handed him by the seller; or if a warranty was omitted from the writing by mutual mistake; or if the parties subsequently change their contract.

If the contract of sale is in writing and under seal, the warranties technically would be called covenants.

CAVEAT EMPTOR.

18. The general rule is that a buyer purchases at his peril, assuming all risks if the subject-matter of the sale be specific goods open to inspection.

Warranties will be implied in regard to a few matters in the absence of any express agreement on those points.

In the absence of an express agreement on the point or of any usage of trade from which an agreement may be implied, if the contract relates to specific goods open to inspection, the buyer is generally held to have assumed all risks as to their condition, quality and fitness. This rule is summed up in the Latin maxim, *caveat emptor*—let the buyer beware. The buyer always can protect himself, whether he examines the goods or not, by refusing to enter into any contract of purchase without any express warranty covering all points. (See Appendix C, Case No. 18.)

The rule is not changed because it would have been extremely inconvenient for the buyer to have examined the goods, or because defects were latent, or because the price paid was the value of a perfect article.

The rule applies even if the seller is aware of the defects and supposes the buyer is being deceived, provided the seller is not under any duty to speak and does not take any steps to conceal defects or to prevent an examination of the goods by the buyer. (See Appendix C, Case No. 13.) If the seller be guilty of acts amounting to fraud, the buyer then would have the rights of any defrauded party to a contract.

There are a few instances in which the law will protect the buyer, even in the absence of an express warranty and although he may have examined the goods. This protection is given through what are known as implied warranties.

WARRANTIES—IMPLIED—DEFINITION.

19. An Implied Warranty is one imputed by law to the seller, being the presumed intention of the parties in the absence of any expressed intention on the point.

An Implied warranty is one imputed by law to the seller by reason of the nature, circumstances, or subject-matter of the contract. It is founded on reason and the presumed intention of the parties in the absence of a contrary intention having been expressed. Implied warranties are not numerous, the most common relating to title, quality, fitness, and genuineness.

WARRANTIES—IMPLIED—TITLE—QUIET POSSESSION.

20. There is an implied warranty on the part of the seller that in an executed sale he has the right to sell the goods; and that in an agreement to sell he will have

a right to sell the goods at the time the ownership is to pass.

Warranty of title is not implied if—

The sale is made by virtue of authority of law or in fact.

The buyer knows that the seller has no title and does not expect him to have.

The transaction is an assignment of such interest as the seller has.

There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

There is an implied condition that the seller of goods in his possession has a right to sell them (See Appendix C, Case No. 14); or, if the contract is to sell goods at a future time, that he will have a right to sell them when that time arrives. [See Appendix A, Uniform Sales Act, §13(1).] This results from the very object of a sale—the transfer of the absolute title to goods. An offer to sell, therefore, amounts to an affirmation of title, as the seller cannot transfer what he does not possess, and the law presumes that he does not offer to perform an impossibility. The buyer is justified in the supposition that he is acquiring ownership, and not a lawsuit.

Under this implied warranty, if the seller did not have any title at the time of the sale, a title subsequently acquired by him after delivery of the goods to the buyer would inure to the benefit of the buyer. The reason of this is that if the seller should assert his newly acquired title and claim damages from the buyer for refusing to surrender the property, the seller would be liable in turn to the buyer for a breach of his implied warranty of title, and the buyer's damages from the seller would be exactly the same as those recovered by the seller from the buyer. Hence, the parties would be in the same position as before the seller asserted his new title.

There is no implied warranty as to title if the seller professes to sell by virtue of authority of law or in fact, as a sheriff or a mortgagee; or where the buyer knows that the seller lacks title; or where the transaction is merely an assignment of such interest as the seller has. In these cases the buyer cannot claim to have relied upon any warranty of title.

There is a further implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of sale. [See Appendix A, Uniform Sales Act, §13(2).] Disturbance of possession by trespassers would not be covered by this warranty.

WARRANTIES—IMPLIED—INCUMBRANCES.

21. There is an implied warranty that the goods shall be free, at the time of sale, from any charge or incumbrance in favor of any third person, not declared or known to the buyer before or at the time the contract is made.

There is an implied warranty that the goods shall be free, at the time of the sale, from any charge or incumbrance in favor of any third person, not declared or known to the buyer before or at the time the contract is made. [See Appendix A, Uniform Sales Act, §13(3).] This implied warranty is similar to the implied warranty of title. The warranty as to title goes to the whole title, while the warranty against incumbrances protects against partial defects in the title, such as an existing mortgage.

WARRANTIES—IMPLIED—QUALITY.

22. There is generally no implied warranty or condition by the seller as to the quality of goods or their fitness

for any particular purpose. There is, however, such an implied warranty in the following cases:

Where there is a usage of trade to that effect.

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose, unless the article is sold under its patent or other trade name.

In the absence of a usage of trade, there is generally no implied warranty or condition as to the quality or fitness for any particular purpose of specific goods open to the inspection of the buyer. (See Appendix A, Uniform Sales Act, §15.) He cannot hold the seller liable simply because the goods are not what he thought they were.

This general rule has a few exceptions. If the buyer expressly or impliedly makes known to the seller, whether a manufacturer or a grower or not, the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, there is an implied condition that the goods offered by the seller shall be reasonably fit for such purpose. If, however, the buyer asks for goods under a patent or trade name, there is no implied warranty of fitness for the buyer's purpose, even though the seller may think that they are not fit. [See Appendix A, Uniform Sales Act, §15 (4).] In such a case the seller is not allowed any alternative except to furnish what the buyer asked for.

Thus, if the buyer wanted a refrigerating machine to cool his establishment to the same extent as it was then being cooled by ice, and this was known to the seller, there would be an implied warranty that the machine furnished would

accomplish such purpose; but if the buyer ordered "a No. 2 size refrigerating machine, as constructed" by the seller, there would not be any implied warranty of fitness.

If the seller is a manufacturer or grower of the article sold, there is also an implied warranty that it is free from latent defects unknown to the buyer, arising during the manufacture or growth, as the manufacturer holds himself out as competent, and is presumed to understand his trade. (See Appendix C, Case No. 15.) Thus, the manufacturer of washing machines, though not acting fraudulently, would be liable for the use of lumber full of knots which came out leaving holes, such knots having been painted over so as not to be noticeable on inspection.

WARRANTIES—IMPLIED—SAMPLE—DESCRIPTION.

23. Where a sale is by sample, there is an implied warranty that the bulk shall correspond with the sample and, if the seller be a dealer in goods of that kind, that they shall be free from any defects, rendering them unmerchantable, which would not be apparent on reasonable examination of such sample.

Where there is a contract for the sale of goods by description, there is an implied warranty that the goods shall correspond with the description; and, if the seller is a dealer in goods of that description, that they shall be merchantable.

If the sale is by sample and description, the bulk must correspond with both the sample and the description.

Sometimes, pending negotiations for the sale of goods not subject to close inspection, such as grain, the seller exhibits a part of the goods to the buyer for the purpose of

showing the quality, the seller expressly or impliedly representing that "the goods are like this." The part so exhibited is called a Sample. Its office is to present to the senses exactly what the subject-matter of the sale is, in a much more satisfactory way than the imperfections of language would allow.

It does not follow, however, whenever a part of the bulk is exhibited by the seller to the buyer, that it is a sale by sample. (See Appendix C, Case No. 18.) If the bulk is present and inspection is offered to the buyer and there is no representation that the bulk is equal to the part shown, the sale is not one by sample, even though it might not be convenient for the buyer to make a thorough examination. Thus, in a sale of apples in barrels which were present and could have been examined by the buyer, the fact that the seller exhibits a few apples with the remark that the apples are a good lot, is not a representation that all of the apples are like the ones shown; but in a case where the buyer, having rheumatism, requested the seller to climb up and open a barrel in one of the top tiers, and the seller did so, showing some of the apples and saying that they were all like that, there was a warranty that all of the apples were equal to the one shown.

If the subject-matter of the sale, although in existence, is bulky or not present, or if it is something to be acquired or manufactured by the seller, it is quite common, pending negotiations, either for the seller to describe the article which he is selling, or for the buyer to describe what he wants. Such transactions are known as sales by description. (See Appendix C, Case No. 17.)

Sometimes a sale is both by sample and description, that is, a sample is shown as representing certain qualities to be possessed by the goods, and the description relates to others. Thus, where a sale of cloth was made by a manufacturer,

to be suitable for coatings and to be of the quality and weight of samples exhibited, it was a sale by sample and description, the sample merely indicating the quality and weight of the cloth, and the additional stipulation requiring the cloth to be so woven that it could be used for making coats therefrom.

In a sale by sample there is an implied warranty that the bulk shall be equal to the sample in quality, kind and nature (See Appendix C, Case No. 11); and, if the seller be a dealer in the goods sold, there is an additional implied warranty that they are free from any defects which would not be apparent on reasonable examination of the sample, which would render them unmerchantable. (See Appendix A. Uniform Sales Act, §16.) (See, also, Appendix C, Case No. 16.) Thus, where a manufacturer sold a saw by sample, and the sample, through defects in material and manufacture, was so soft as to be useless and unmerchantable, but this was not apparent on reasonable examination, the buyer could reject the saw delivered although equal to the sample.

It is difficult to give an accurate definition of "merchantable." It sometimes is said to mean salable in the market at the ordinary price. Merchantability does not require the goods to be the very best. Some goods might be suitable for many purposes and merchantable though not suitable for every purpose. (See Appendix C, Case No. 13.) Thus a reaping-machine might be merchantable—fit for the general purpose for which it was manufactured, and yet it might not work satisfactorily on rough ground. Merchantability must be given a reasonable meaning. One decayed apple in a barrel of apples would not make the entire lot unmerchantable, though it might be otherwise if three apples were purchased and one of them was decayed. Second-hand goods are not merchantable.

In a sale by description there is an implied warranty that the goods shall correspond with the description; and, if the seller is a dealer in goods of that description, that they shall be merchantable. [See Appendix A, Uniform Sales Act, §15(2).]

If the sale is by both sample and description, the goods must not only be equal to the sample, but must conform to the description. (See Appendix A, Uniform Sales Act, §14.) (See, also, Appendix C, Case No. 17.)

WARRANTIES—IMPLIED CANNOT NEGATIVE EXPRESS.

24. A warranty will not be implied to contradict an express agreement; but an express warranty, even though appearing in a written contract of sale, will not prevent warranties being implied if not inconsistent with those expressed.

Warranties are implied because they are presumed to be the intention of the parties, but there is no occasion for implication if the parties have expressed their intention. Thus, while the general rule is that a warranty of fitness will be implied where the buyer makes his purpose known and appears to rely on the seller's judgment, such a warranty will not be implied if, after the buyer has stated his wants, the seller expressly states that he does not know whether the article will be fit for the desired purpose. It is evident that the buyer then assumes the risk of fitness.

While there cannot be any warranty implied which would be inconsistent with the terms of the seller's contract, an implied warranty on one point will not be excluded merely because there is an express warranty on another point not inconsistent. [See Appendix A, Uniform Sales Act, §15

(6).] Thus, an express warranty of quality would not prevent a warranty being implied as to the title. Even though the parties have embodied their agreement in a formal bill of sale, implied warranties, not inconsistent with the instrument, can be relied on, such terms being added by law and not by the parties.

CHAPTER IV.

TRANSFER OF OWNERSHIP AS BETWEEN SELLER AND BUYER.

25. Intention—Risk.
26. Intention—Presumptions.
27. Specific Goods in Deliverable State.
28. Specific Goods Not in Deliverable State.
29. Goods Delivered to Buyer.
30. Unascertained Goods.

INTENTION—RISK.

25. The ownership of the subject-matter of a sale, as between the parties, will pass from the seller to the buyer when they intend it to pass.

In the absence of any agreement to the contrary, the risk of any loss or damage to the goods rests on the party owning the goods at the time the loss or injury occurs, unless a reservation of ownership was made by the seller merely as security for payment of the price.

Where delivery has been delayed through the fault of either the seller or the buyer, the goods are at the risk of whichever one is at fault, as regards any loss which might not have occurred but for such fault.

Much litigation in regard to sales involves the exact time when the ownership of the subject-matter passes from the seller to the buyer. The goods necessarily must be owned by either one or the other of the parties, and there must be some instant when the ownership is transferred. The point becomes very important when the goods are damaged, destroyed, or stolen without negligence by either

party, or if they subsequently increase in value, or if creditors of either party seek to levy upon or to attach the goods, or in determining the liability for the payment of taxes, or the right to collect insurance-money, or in fixing the rights of sub-buyers, whose titles would depend upon title being in the buyer.

As in other disputed points, it is the intention of the parties which governs. [See Appendix A, Uniform Sales Act, §18 (1).] If they have expressly agreed when ownership is to pass, their agreement governs.

Risk of loss or damage usually follows ownership; though the parties might agree that ownership is to be in one of them, and the risk is to rest on the other.

Either party negligently or wrongfully delaying the delivery of the goods sold would be held to have assumed the risk so far as any loss is concerned which might not have occurred except for such delay. [See Appendix A, Uniform Sales Act, §22 (b).]

In a conditional sale where the seller expressly has reserved ownership, the risk is on the buyer as soon as the goods are delivered to him without any express agreement to the contrary, as the reservation of the title is more in the nature of taking security for the unpaid price. [See Appendix A, Uniform Sales Act, §22 (*a*).]

INTENTION—PRESUMPTIONS.

26. If the parties have not agreed when ownership is to pass from the seller to the buyer, the law implies certain arbitrary rules for ascertaining such time, based on their presumed intention as indicated by their acts.

Usually the seller and buyer have not anticipated contingencies, and have not given any thought to the exact

time when ownership in the goods is to pass from one to the other; hence the law has laid down rules for implying the intention of the parties, to be gathered from their acts. (See Appendix A, Uniform Sales Act, §19.) These rules distinguish between specific and unascertained goods; and, in the case of specific goods, much depends on whether they are in a deliverable state or not.

Goods are said to be in a deliverable state when they are in such condition that the buyer has no legal excuse for not accepting them as they are, that is, they conform to the terms of the contract. [See Appendix A, Uniform Sales Act, §76 (4).]

SPECIFIC GOODS IN DELIVERABLE STATE.

27. Unless a different intention appears, where there is an unconditional contract to sell specific goods in a deliverable state, the ownership of the goods passes from the seller to the buyer when their contract is made.

When an unconditional contract is made for the sale of specific goods in a deliverable state, the ownership passes to the buyer the instant the contract is complete, although the buyer has not received possession (See Appendix C, Cases No. 13 and 19), or paid the price, or the article is not present. Thus, the seller says, "You may have this horse for fifty dollars." The buyer responds, "I'll take it," at which instant the horse becomes his although it may not be delivered to him for some time thereafter. In the absence of any agreement as to credit, the seller at once would be entitled to be paid the price; and a condition sometimes is implied by law that the ownership is not to pass except on immediate payment of the price, as would be the case if the parties are strangers.

SPECIFIC GOODS NOT IN DELIVERABLE STATE.

28. Unless a different intention appears, where there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the ownership does not pass to the buyer until such things be done.

If the seller, under his agreement, is required to do something to put the goods into a deliverable state, such as painting a wagon, or he is to weigh, to measure, or to test the goods, the ownership thereof does not pass to the buyer until such thing is done. (See Appendix C, Case No. 20.) In the absence of any agreement on the point, the expense of putting the goods into a deliverable state must be borne by the seller. [See Appendix A, Uniform Sales Act, §43 (5).]

GOODS DELIVERED TO BUYER.

29. When goods are delivered to the buyer their ownership at once passes to him, unless such delivery is—
For mere inspection.
On approval.

Where goods are delivered to the buyer on approval, the ownership thereof passes to him when he signifies his approval.

Delivery of the goods to the buyer raises a presumption that the ownership is in him, although they are to be measured, weighed, or sorted by him (See Appendix C, Cases No. 8 and 13), or he has an option to return them; but this presumption is not conclusive. Delivery of the goods to the buyer for the purpose of inspection merely would not indicate any intention to transfer ownership.

The ownership of goods delivered on approval does not pass until the buyer expressly or impliedly signifies his approval. (See Appendix C, Case No. 6.) Such approval would be implied by his retaining the goods beyond the time fixed for their rejection; or, if such a time was not designated, after the expiration of a reasonable time.

UNASCERTAINED GOODS.

30. Where there is a contract to sell unascertained goods, ownership does not pass to the buyer until the goods have been appropriated to the contract, unless the intention of the parties is to own the goods jointly.

Appropriation is made by both parties selecting the particular goods which are to be the subject-matter of the contract. One party, with the assent of the other, can make the appropriation; and such assent may be implied.

Delivery of goods by the seller to a carrier for transmission to the buyer is appropriation to the contract; and ownership passes as between the seller and buyer upon such delivery unless—

The goods are improperly packed or addressed.

The seller makes an unreasonable contract with the carrier.

The seller disregards instructions from the buyer.

The goods do not conform to the express or implied terms of the contract.

The contract requires the seller to send the goods to the buyer or to deliver them at a particular place, or to pay the cost of transportation.

The seller has reserved title by taking the bill of lading for the goods in his own name; but if this is done merely for the purpose of securing performance of the contract by the buyer, the risk is on the buyer.

The seller retains possession of the bill of lading although taken in the buyer's name.

The seller transmits the bill of lading with a draft to be accepted or paid by the buyer, although the bill of lading is in the name of the buyer and he obtains possession thereof without acceptance or payment of the draft.

If a sale is made of unascertained goods, ownership does not pass to the buyer until the goods are ascertained or individualized (See Appendix C, Cases No. 20 and 21), unless it is a sale of an undivided part with the intention that the seller and buyer are to own the subject-matter in common. (See Appendix A, Uniform Sales Act, §17.) Thus, if *A,* having two thousand bushels of grain in a bin, sell one thousand bushels of it to *B,* the latter does not become the owner of any particular one thousand bushels until they have been ascertained by separation. Prior to such separation, if the grain should be destroyed by fire, the loss would fall on *A,* as he is the owner. If, however, *A* sold *B* one thousand bushels with the understanding that the two were to become owners in common of all of the grain, the ownership of an undivided one-half would pass to *B* at once.

Unascertained goods become ascertained by appropriation to the contract; and appropriation to the contract is made by both parties selecting the particular goods which are to be the subject-matter of the sale. Thus, a customer walks into a store and orders and pays for one thousand rolls of wall-paper of a designated kind. The ownership of a thousand rolls would not at that instant pass to the buyer as would be the case if the goods had been specific; hence if the seller's creditors were to levy upon the seller's stock immediately after the sale, the buyer could not rightfully claim that any of the paper belonged to him although

he had paid for all he ordered. He merely would have a claim of doubtful value against the seller for the failure to perform the contract. Even though the seller had exactly one thousand rolls of wall-paper of the designated kind in stock at the time the contract was made, the ownership would not, for that reason alone, pass to the buyer, as the seller would have a right to sell what he had in stock and to order additional wall-paper for the purpose of filling the order, provided it would not cause unreasonable delay. As soon as the seller has set aside one thousand rolls for the buyer and the buyer has assented to this selection, the goods would be appropriated to the contract, thereby becoming ascertained, and ownership therein, with all the attendant risks, would pass to the buyer as between the parties.

While appropriation to the contract requires action by both parties, one of them can, and very frequently does, act as agent for the other. Thus, in the illustration just given, the seller might ask the buyer to pick out what wall-paper he wanted; or the buyer might say, "I'm in a hurry; you send the paper to me," in which case the appropriation would be complete as soon as the paper was sent, provided it conformed to the contract.

Sometimes authority for the seller to act for the buyer in making the appropriation will be implied, as would be the case if the buyer sends receptacles for the goods, such as sacks or bottles to be filled by the seller. (See Appendix C, Case No. 21.)

Where goods are ordered from a distance, implied authority necessarily is given to the seller to make the selection; and the appropriation generally is complete as soon as the goods are in possession of a carrier for transmission to the buyer, even though the goods are sent "collect on delivery" (usually abbreviated to "C. O. D."),

meaning that the carrier is to collect the price before delivery of the goods to the buyer. Although the goods necessarily must be separated by the seller before delivery to the carrier, such separation alone would not be appropriation, and the seller would have a right to sell such separated goods to a third person, provided the seller properly performs his contract with the buyer by delivering other goods to the carrier in time.

Where goods are sent by a carrier, the risk rests on the seller if he has been negligent in packing the goods. Fragile goods, as eggs, should be properly packed; and, in extremely hot or cold weather, proper precautions should be taken by the shipper to prevent damage to the goods from temperature.

The risk likewise remains in the seller if he has been negligent in addressing the goods. Where there are two places of the same name in a State, the seller would be negligent if they are missent by reason of not having added the name of the county to the address.

The risk remains in the seller if he makes such a contract with the carrier as to deprive the buyer of a remedy against the carrier. Thus, where a carrier is liable for a limited value only unless the true value is stated and additional freight paid, and the seller sends goods several times that value without stating the true value, in event of a loss the buyer is not liable for the price, as delivery to the carrier did not transfer the ownership to him.

Likewise, the risk rests on the seller if he does not observe reasonable instructions from the buyer. Thus, if the buyer instruct the seller to insure the goods, or there is a custom to that effect, the failure of the seller to observe the express or implied instruction would make the carrier his agent and not the agent of the buyer. So, if the goods do not conform to the contract or to the conditions implied

by law, there has not been an appropriation of the goods with the consent of the buyer, and ownership of the goods would remain in the seller. Thus, the ownership of goods delivered to a carrier will not pass to the buyer if they are unmerchantable at that time; but the seller does not impliedly warrant that the goods will be merchantable when they reach the buyer. Certain goods will deteriorate. Metals will rust, perishable goods will decay, and animals may injure each other; but such risks rest on the buyer unless the seller has assumed them.

Delivery of goods to a carrier for transmission to the buyer will not be delivery to the buyer if, under their contract, the seller is to send the goods to the buyer, or to deliver them at a particular place, and delivery to the carrier is for the purpose of performing this term of the contract, or if the seller is to pay the cost of transportation to the buyer or to a particular place. In such a case the risk remains in the seller until the goods reach the buyer or the designated place.

The phrase "free on board" (usually abbreviated to "f. o. b.") means that the shipper is to have the goods on board of the carrier's conveyance at some designated point without any expense to the buyer prior to such delivery. Thus, if the goods are to be sent by rail, and the seller is at *A* and the buyer at *X*, and *M* is some intermediate point, the agreement might be that the goods are to be shipped f. o. b. at seller's factory in *A*, or f. o. b. at *X*, or f. o. b. at *M*. In the first case the seller performs his contract by loading the goods on the cars at his factory in *A*, leaving the buyer to bear the expense of transportation. In the second case the seller must bear the expense of loading and the freight-charges to *X*, but not the expense of unloading. In the third case the seller bears the expense of loading and pays the freight from *A* to *M*, and the buyer pays the freight

from *M* and bears the expenses thereafter. In the first case the presumption would be that the ownership and attendant risk passed to the buyer as soon as the goods were loaded on the car. In the second case the presumption would be that the ownership and the risk remained in the seller until the car reached it destination. In the third case the presumption would be that the ownership and the risk were transferred to the buyer when the car reached the intermediate point. These presumptions, however, are not conclusive, for if the agreement was that the buyer should reimburse the seller for expenses incurred in shipping the goods, it would seem to indicate that the general rule applied, and that the buyer became the owner of the goods when they were delivered to the carrier.

Another instance in which the seller will remain the owner of goods while they are in the possession of a carrier for transmission to the buyer is where he has reserved ownership by the form of his contract with the carrier. When goods are sent by a carrier, the carrier usually issues a Bill of Lading in which, first, is an acknowledgment of the receipt of the goods, and, second, an agreement to carry them to a point named therein. Generally, the goods will not be delivered by the carrier at their destination without presentation of the bill of lading. If the seller has the bill of lading taken out in his own name, title to the goods remains in him while the goods are in the possession of the carrier. He is said to have reserved the *jus disponendi* (Latin, right of disposing). If, however, the seller has taken a bill of lading in the name of the buyer, ownership would pass to the buyer unless the seller retain the bill of lading in order to secure himself; but even in such a case the risk passes to the buyer, the situation being similar to a reservation of title in a conditional sale. The ownership likewise remains in the seller where the bill of lading is taken out

in the name of the buyer, if the bill of lading with a draft attached is sent to some third person, usually a banker, with instructions to have the draft accepted or paid before the bill of lading is delivered to the buyer. In such a case the ownership of the goods does not pass, as between the parties, although the buyer obtains possession of the bill of lading and neglects or refuses to accept or to pay the draft.

It must be borne in mind that the rules here discussed are restricted to the rights of the seller and buyer against each other, and do not necessarily apply in a dispute arising with the carrier.

Where a carrier has been expressly designated by the buyer or it has been customary to ship by a particular carrier, delivery to a different carrier would not be delivery to the buyer, and the risk would remain on the seller. Still more, if there was no express or implied direction by the buyer to the seller to deliver the goods to any carrier, such a delivery would not transfer the risk to the buyer.

Appropriation of goods to a contract will not cause ownership to pass to the buyer if it would not pass at once in the case of ascertained goods. Appropriation merely causes the goods to become ascertained, and they then are governed by the rules heretofore given in regard to a sale of specific chattels. Thus, if the seller is to do something to the articles so appropriated, to put them into a deliverable state, such as making certain alterations therein, the ownership, in the absence of any agreement to the contrary, would remain in the seller until he has done whatever he agreed to do.

CHAPTER V.

TRANSFER OF OWNERSHIP AS TO THIRD PERSONS.

31. Seller Without Title.
32. Seller With Voidable Title.
33. Fraud on Seller's Creditors.
34. Seller Retaining Possession.
35. Buyer in Possession Without Title.
36. Bulk Sales.

SELLER WITHOUT TITLE.

31. As a general rule, the seller cannot transfer any better title than he has to the buyer.

In some cases where the seller of goods did not have any title, the owner may be estopped from claiming them from an innocent buyer.

In a few cases, as in an emergency, or under Factors' Acts, an agent, without express authority to sell goods, can transfer absolute ownership to a third person.

A person selling by authority of law or in fact can transfer absolute ownership to a third person.

It is very important for the student to bear in mind that the rules laid down in the last chapter are restricted to cases where the dispute is solely between the seller and the buyer; and such rules do not necessarily apply when the rights of third persons are involved. The rules now to be discussed in this chapter apply when third persons claim some interest in the subject-matter of the sale, and these rules do not necessarily apply when the dispute is

confined to the seller and the buyer. In other words, there are two sets of rules bearing on the transfer of ownership, and confusion will result if the distinction between the two is overlooked.

Generally a seller cannot give any better title than he has. If he has no title, the buyer acquires none, except as might result from the statute of limitations. [See Appendix A, Uniform Sales Act, §23 (1).] (See, also, Elementary Law, Case No. 7.) A person who has hired a horse and is rightfully in possession thereof cannot give absolute ownership to one buying for full value on the supposition that the seller was the owner. The buyer can be compelled to surrender the horse to its true owner without compensation. Moreover, if a horse is sold by one without title, and subsequently is the subject of several transfers, the true owner can recover its value from anyone who, at any time, had possession, however innocent such person may have been; though the owner, after once obtaining the full value of the horse from anyone, cannot thereafter hold any of the others. The one who thus has been compelled to pay the owner has in turn a right of action on an implied warranty of title from the person who sold the horse to him; and theoretically this right of action would pass back, one by one, until the person who wrongfully sold the horse in the first place has reimbursed the person who bought from him.

There are some exceptions to this general rule. If the owner of goods, being aware that someone is selling them to an innocent person, does not interfere in the proceeding, the owner will be estopped and will not be allowed to reclaim the goods. Thus, where a wife, owning some chickens, stood by without objection while her husband sold them to a person who supposed they belonged to the husband, she afterwards was not allowed to take them from the buyer. She should have spoken sooner.

In some instances an agent in possession of goods may dispose of them without actual authority from his employer, if an emergency exists and there is no reasonable opportunity for communication with the employer, and the employer's interests seems to require prompt disposition of the property.

In some States what are known as "Factors' Acts" have been passed. They vary in their wording, but provide that an agent intrusted with goods or with the documentary evidence thereof, such as a bill of lading, can give good title to goods to one buying in good faith, although such agent may not have been authorized to sell. [See Appendix A, Uniform Sales Act, §23 (2) (*a*).]

A person selling by authority of law may transfer title to the buyer although the person conducting the sale does not claim to have any title. [See Appendix A, Uniform Sales Act, §23 (2) (*b*).] Thus, a sheriff selling the goods of a judgment-debtor can give a good title to the buyer although the sheriff does not have any title and the debtor objects to the sale, provided the judgment, levy and all other proceedings were valid and regular. In such a case, however, the buyer cannot obtain any better title than the judgment-debtor had. If the debtor had a defective title, the buyer acquires the same defective title; and if the debtor had no title at all to the goods levied upon by the sheriff, the buyer not only does not obtain any title, but he would be liable to an action by the true owner for damages, unless the owner is estopped by having intentionally misled the sheriff into levying upon the wrong goods. The above rules apply also to a sale by a mortgagee or by a pledgee of goods on non-payment of the debt secured.

If a sale be made by a sheriff, and the judgment upon which it was based is afterwards reversed on appeal, the title of the buyer will not be affected unless he was con-

nected with the suit in some way, as a party or as an attorney. In such a case the remedy of the owner of the goods would be against the party who brought the suit.

SELLER WITH VOIDABLE TITLE.

32. Where the seller has been induced to enter into a contract of sale through fraud of the buyer, the buyer's title is voidable at the option of the seller; but, until the seller avoids it, the buyer can give a good title to a sub-buyer who purchased in good faith.

Most of the instances in which the rights of third persons are involved in a sale are connected with fraud, either actual or constructive. Constructive or legal fraud consists of acts which, though not originating in any positive evil design or with any intention to injure, yet tend to deceive and to mislead others and to violate their confidence. (See Appendix C, Case No. 23.) The effect being bad, the law substitutes the effect for the intent, and construes the intention to have been wrong.

In many cases the rights of a third person in goods depend on his having acquired his interest for value and in good faith.

In some States a person who takes goods in extinguishment of, or as security for, an antecedent debt is a holder for value. (See Appendix A, Uniform Sales Act, §76.) In other States he is not treated as such. An Antecedent or Pre-existing debt is one growing out of some previous and independent transaction with the seller, and not from the present sale. In those States in which a person taking goods in payment of an antecedent debt is regarded as a holder for value, the theory is that, by refusing to allow him to retain the goods and thus reviving his claim against

the seller, he is in no worse position than he was before he acquired them. In the other States it is insisted that the buyer is "lulled into security" and, taking no further action to enforce his claim against the seller, may be placed in a worse situation by having the goods taken from him. A person taking goods in payment of an antecedent debt is a holder for value in every State if, in reliance upon the validity of the sale, he has released securities held by him for his claim against the seller.

A creditor of the buyer who levies upon or attaches the goods is generally not regarded as a holder for value, nor does a trustee in bankruptcy occupy the position of a transferee for value from the bankrupt.

A person acts in good faith when he acts honestly though he may be grossly negligent; but he does not act in good faith if he has notice of facts which would put him on inquiry and would lead to the discovery of such rights, and he willfully avoids information.

Whenever actual fraud by one party enters into a contract of sale, it has the same effect as in any contract, that is, makes it voidable at the option of the defrauded party, whether seller or buyer, but the fraudulent party is bound if the defrauded party choose to hold him. If the fraudulent party is the buyer and he is given possession of the goods, he can give a perfectly good title to anyone buying from him in good faith. (See Appendix A, Uniform Sales Act, §24.) Although a bailee, a thief, or a finder of property cannot give a good title thereto to a buyer, however innocent the latter might he, as the bailee, thief, or finder does not have such a title to transfer, a fraudulent buyer actually has the ownership between the time of the sale and the avoidance of the contract by the seller, as the seller intended to transfer and did transfer the ownership to him. It follows, then, that if the fraudulent buyer sells

the property while he has title, the sub-buyer will obtain title. The seller and the sub-buyer are equally innocent, but the sub-buyer has ownership, and it cannot be taken from him. It is an application of the maxim that where one of two innocent parties must suffer through the fraud of a third person, the loss should be borne by the one who enabled the fraud to be committed. (See Appendix C, Case No. 22.) If the sub-buyer was aware of the defective title at the time he paid for the goods, he acquires such defective title only, as he has not acted innocently, and must surrender the goods to the seller if demanded. So, a third person who has received the goods without any consideration cannot hold them as against the defrauded seller, for although he may have acted in good faith, he will not be injured by surrendering them, and the seller's rights are superior.

FRAUD ON SELLER'S CREDITORS.

33. Where a debtor, to defraud his creditors, sells his property to someone with notice of the fraud, the creditors can take the property from the buyer, but not from anyone who has purchased in good faith.

Sometimes a debtor, to avoid having his goods taken for his debts, will sell them to a third person. In such a case if the buyer acts in good faith and pays reasonable value, the creditors of the seller cannot interfere with the buyer's possession; but if the buyer, at the time he pays for the goods, is aware of the fraud, the creditors can take the goods from him. If he acquire knowledge after having partly paid the price, he is protected as to such payment, but not as to subsequent payments. It makes no difference through how many hands the goods may pass, a defrauded party can take them as long as they never have come into the possession of someone for value without notice.

SELLER RETAINING POSSESSION.

34. After a sale is complete, possession of the goods by the seller with the consent of the buyer is fraudulent as to third persons who, in good faith, have acted on the supposition that the goods still belong to the seller.

When the owner of goods is in financial difficulty and his creditors seek to levy upon or to attach his goods, there is a great temptation on his part, by connivance with a friend, to manufacture testimony that the goods previously had been sold to this friend. On the other hand, it is not an uncommon thing for a person who has bought and paid for goods in perfect good faith to leave them temporarily in the possession of the seller. This leads to a consideration of the rights of innocent third parties who, misled by possession of the goods by the seller, have acted upon his supposed ownership thereof. A presumption of actual fraud arises in every case where the seller is left in possession; but, in many jurisdictions, this presumption is *prima facie* only, that is, the buyer is allowed to show, if he can, that the transaction was in perfect good faith throughout. In many other jurisdictions the presumption of fraud in such cases is conclusive, that is, the courts will not allow any evidence to be offered to the effect that the transaction was in good faith. Although a bad intent be lacking, the transaction leads to bad results. The continued possession of the seller without any indication of a change of ownership enables him to hold out a fictitious credit, unless the goods are of a class which would be exempt from the claims of creditors; and, under the rule that where one of two innocent parties must suffer through the act of a third the loss must fall on the one who enabled it to be committed, the buyer is not allowed, in these jurisdictions, to claim the

goods as against third persons who have extended credit to the seller, or who have levied upon or have attached the goods as being his. (See Appendix A, Uniform Sales Act, §26.) Likewise, subsequent mortgagees and pledgees of the goods in good faith are protected.

If the seller, left in possession, resells the goods to a second buyer the title passes to the one first taking possession, whether the first or second purchaser. (See Appendix A, Uniform Sales Act, §25.) (See, also, Appendix C, Case No. 23.)

In most, but not in all, jurisdictions, anyone having notice of a sale cannot acquire any rights against the buyer although the goods are left in the seller's possession, as such a person cannot claim to have been misled to his injury. Notice may be actual or constructive. Actual notice is either direct information of a fact given to a person, or knowledge of circumstances which would lead to direct information. Constructive notice is that which the law conclusively presumes a party to have from certain circumstances although he may not in fact have it.

The buyer's interests are not prejudiced by the mere fact that he may have left the goods in the possession of the seller if he take possession before any rights have been acquired by third persons. A transfer of possession is notice that there has been some change in the ownership. This leads to a consideration of the acts which are regarded in law as sufficiently indicating a change of possession.

An actual transfer of possession which is formal and temporary only will not suffice as to third persons, as where the buyer of horses drove them to his home and hitched them in front for half an hour, and then returned them to the seller. On the other hand, a temporary return of the goods in good faith to the seller will not affect the buyer's rights; as where the seller of a horse and wagon borrowed

them four days after the sale, to drive to town. In the former case the creditors of the seller, not knowing of the sale, could levy upon the horses, as the formal delivery was merely an effort to evade the law; but in the latter case they could not, as the loan of the goods to the seller was a common act of neighborly kindness performed in good faith.

If the seller wrongfully regain possession of the goods from the buyer, the rights of the latter will not be prejudiced unless he delays unnecessarily in reclaiming the goods.

Actual possession taken by the buyer will be insufficient if, to all appearances, a change of possession has not occurred. Thus, where the buyer of a stock of goods was an employee in the store prior to the sale, third persons would be justified in supposing that his presence in the store was still that of an employee and that the seller remained the owner. A change of signs on the store might have been sufficient, and goods may be left in the seller's possession if the buyer's acts give notice to third persons that he is the owner. Thus, branding cattle with the buyer's mark would be sufficient. Registering a bill of sale with the proper recording officer of the county in which the goods are is constructive notice to all who afterwards seek to acquire rights in the goods, whether they have actual knowledge or not. Everyone intending to acquire rights in goods is supposed to search official records to ascertain whether others than the party in possession have any rights therein; and the law construes notice as to everything that such a search might have revealed.

It is good business where ownership of an article is in one person and possession is with another, for a notice of the ownership to be placed on or near the article, though this alone might not give complete protection. It is also

advisable to give as much additional publicity as to the ownership as is practicable. Thus, in a sale of a growing crop, it might be well for the buyer to place notices of the sale on the fence surrounding the field where the crop is, and to inform the neighbors of the sale.

If goods are sold at public sale, whether by an officer or by a private person, the act is so notorious that everyone will be presumed to have notice of it.

If the goods, at the time of sale, were in the possession of a third person, sufficient notice of the sale is imparted to everyone by giving information of the sale to the person in possession, as it would be the duty of anyone, seeking to acquire rights in goods in the possession of another person, to ask what his rights are, and such an inquiry should have revealed the fact that the buyer was the owner.

BUYER IN POSSESSION WITHOUT TITLE.

35 If, with the consent of the seller, the buyer is given possession of the goods but title is withheld, third persons who, in good faith, act on the supposition that the goods belong to the buyer will be protected as against the seller.

One of the most common conditional sales is where an unpaid seller delivers the goods to the buyer under an express agreement that the ownership is to remain in the seller until he is fully paid. This kind of a transaction is so common that it is the one understood to be meant when a conditional sale is mentioned without any further statement as to the nature of the condition. In a conditional sale it is the buyer who usually is in possession of the goods and thus enabled to hold out a false credit and, by the apparent ownership of the buyer, mislead third persons without notice. Under the common law rule that a person

without title has nothing which can be transferred, even those acting in good faith in the belief that the buyer in possession is the owner logically cannot acquire any title as against the unpaid seller who has retained it. A few States have not followed this rule, holding that the transaction is constructively fraudulent even though not actually so; that, in such cases, the seller could have protected himself by a mortgage, and, not having done so, should be the one to suffer rather than innocent third persons who have been misled by the seller's act. In many States statutes have been enacted requiring conditional sales to be recorded, thus giving constructive notice to third persons of the seller's rights. As a result of such statutes or of supreme court decisions, it may be stated that the general rule now is that third persons without notice, actual or constructive, of an unpaid seller's rights, who act on the supposition that the buyer in possession of goods is the owner thereof, will acquire rights superior to those of the seller. (See Appendix C, Case No. 24.)

If, however, the buyer has obtained possession of the goods without the express or the implied consent of the seller, the latter's rights will not be prejudiced unless he unreasonably delays in asserting them after he has knowledge of the buyer's wrongful act.

Although possession by the buyer with the consent of the seller under a conditional sale is conclusively fraudulent as to third persons without notice, if the seller rightfully retakes the goods from the buyer or gives proper notice before any rights of third persons have attached, the seller will be protected.

As a person hiring or borrowing goods, although in possession, cannot give a third person a good title thereto although the latter acted in good faith and paid full value, unpaid sellers have sought to take advantage of this principle

by describing a conditional sale as a lease; but if a sale actually was intended, third persons will not be affected by the subterfuge of calling the transaction a lease. Thus, where a piano was delivered under a "lease" providing that the "lessee" was to pay a monthly "rent" of fifty dollars, the first installment to be paid on delivery of the piano, and that if, within thirteen months thereafter, he should pay seven hundred dollars, the piano was to become his, in which case all rent previously paid was to be applied on the purchase-price of seven hundred dollars, the transaction is a sale and not a lease.

Students sometimes ask why, if a buyer in possession under a conditional sale can give an innocent third person a good title, a bailee likewise cannot give an innocent third person a good title, as the bailor has deliberately placed the bailee in possession and enabled him to hold out a false credit as much as the buyer could. The reason for the distinction is that the seller's chief object is to transfer title and he has easy means for protecting himself in regard to the unpaid purchase-price; while to apply this rule to bailments would be to interfere with a vast amount of the business of the world. Conditional sales are made with some deliberation; bailments frequently are made hurriedly without time for giving constructive notice by registration and in many cases the bailment would be terminated before time would permit for drawing any documents. The law does not want to lay down unreasonable rules; but it is considered that less injury results from protecting innocent third persons in the case of conditional sales than if the rights of the seller were upheld.

BULK SALES.

36. By statute in most States the sale of an entire stock of merchandise is fraudulent as to creditors of the seller unless they are given previous notice of the transaction.

After a person has become unsuccessful in trade and his indebtedness reaches a point where he despairs of paying it, there is a temptation on his part to dispose of his entire stock and to disappear with the proceeds without settling his debts. In the absence of any statute on the point, the buyer taking possession of the stock in such a case could hold the goods as against the seller's creditors, unless it could be shown that the buyer was a party to the fraud; hence, to protect creditors in cases of this kind, nearly every State has enacted a statute known as the Bulk Sales Law. The statutes in the various States are not uniform in their wording; but their provisions are similar, requiring that, upon a sale of all or of a major part of a stock of merchandise, otherwise than in the regular course of trade, the transaction will be fraudulent as to the creditors of the seller unless they are given certain designated notice in order that they may take steps to protect their rights if they so desire. (See Appendix C, Case No. 25.)

CHAPTER VI.

PERFORMANCE OF THE CONTRACT.

37. By Seller—Delivery—Duty to Make.
38. By Seller—Delivery—Place.
39. By Seller—Delivery—Time.
40. By Seller—Delivery—Quantity—In General.
41. By Seller—Delivery—Quantity—Qualifying Words.
42. By Seller—Delivery—Installments.
43. By Seller—Delivery—Kinds.
44. By Seller—Delivery—Documents of Title.
45. By Seller—Tender.
46. By Buyer—Acceptance.
47. By Buyer—Payment.

BY SELLER—DELIVERY—DUTY TO MAKE.

37. It is the duty of the seller to deliver the goods to the buyer in accordance with the terms of the contract, upon performance by the buyer on his part.

In the absence of an express or of an implied agreement on the point, the seller is not required to send the goods to the buyer.

It is the duty of the seller to deliver the goods, upon performance by the buyer of the terms of the contract. (See Appendix A, Uniform Sales Act, §41.) Delivery is voluntarily placing the buyer, or allowing him to place himself, in the same position of control over the property as the seller had; and it may be accomplished by doing something and saying nothing, or by saying something and doing nothing, or by both.

The student must not confuse "delivery" with "sending." In popular language delivering goods by the seller means sending them to the buyer's place of business or residence; but in law the two terms are not synonymous. Unless there is an express agreement to that effect or one implied from custom or from a former course of dealing between the parties, there is no obligation on the seller to send the goods to the buyer, but the buyer must obtain the goods at the place of delivery.

BY SELLER—DELIVERY—PLACE.

38. The seller must deliver the goods at the place expressly or impliedly agreed upon.

In the absence of an express agreement on this point, the place of delivery is the seller's place of business if he have one; otherwise at his residence.

If the sale relates to specific goods known by the parties at the time of sale to be in a particular place, the place of delivery is at such place.

In the absence of agreement, express or implied, on this point, the place of delivery of specific goods known to be in a particular place at the time of the sale is where the goods are; otherwise, delivery is to be made at the seller's place of businsss, if he have one, or, if not, at his residence. [Appendix A, Uniform Sales Act, §43 (1).]

BY SELLER—DELIVERY—TIME.

39. Delivery must be made at the time agreed upon. If a time for delivery has not been specified, then delivery must be made within a reasonable time.

Delivery must be made at the time agreed upon (See Appendix C, Case No. 17); or, if a time for delivery was not specified in the contract, within a reasonable time.

The buyer has the option of rejecting or of accepting goods tendered at the wrong place or time, being entitled, however, to recover any damages he may have sustained by reason of the improper delivery.

BY SELLER—DELIVERY—QUANTITY—IN GENERAL.

40. The seller must deliver the exact quantity agreed upon.

The buyer has the right to reject the goods if the seller send—

More than the right quantity.

Less than the right quantity.

The right quantity, but mixed with other goods.

The buyer can waive a defective delivery as to quantity. If the seller intentionally delivers more than the contract amount, the buyer can accept such goods as conform to the contract, or he can keep all of the goods, treating the seller's act as an offer to sell the excess at the contract rate.

To perform his agreement fully the seller must tender the exact quantity called for in the contract, unless sent as good measure; otherwise the buyer can reject the goods if the amount be more or less than the contract calls for, or if the goods, though of the right quantity, are mixed with other goods. [See Appendix A, Uniform Sales Act, §44 (1).] This rule, however, must be applied reasonably. If the contract called for ten chairs of a certain kind, and the seller sent twelve of that kind, or ten of that kind and two of another kind, the buyer would not be justified in rejecting the goods on the mere technicality that too many were sent, or that the goods were mixed, if it would be easy for him to take ten chairs and leave two; but the buyer is not

expected to take time or trouble or incur expense in picking out what he orders. Thus, where crockery ordered is sent in a crate mixed with crockery of another kind, the buyer is not required to make a separation.

If the goods sent are more than the contract called for, or are improperly mixed with other goods, the buyer has the right to pick out what he ordered and reject the rest. [See Appendix A, Uniform Sales Act, §44 (3).] If more than was ordered was sent, unless clearly by inadvertence, the buyer can take all, treating the act of the seller as an offer to take the excess at its proportionate contract-price. [See Appendix A, Uniform Sales Act, §44 (2).] Likewise, if too little is sent, the buyer can accept what is sent. If the buyer was aware of the defective delivery at the time he accepted it, he must pay at the contract rate. [See Appendix A, Uniform Sales Act, §44 (1).]

Of course the rule that the buyer can reject a tender of too large a quantity does not apply if there is an agreement or custom to the contrary. Thus, where it is a local custom for buyers of ore to take the exact amount from a pile of ore owned by the seller, or for buyers of oil in bulk to pump the required amount from the seller's reservoir, a buyer could not rightfully complain that the seller did not tender the exact amount purchased.

BY SELLER—DELIVERY—QUANTITY—QUALIFYING WORDS.

41. If the contract contain qualifying words as to the amount to be delivered, much latitude is allowed if the goods are described as being located within definite bounds, or are for a specified purpose, and the amount is named in good faith merely as an estimate.

In other cases, the deviation from the amount named must not be unreasonable.

To protect himself against liability for non-performance of his contract in the matter of amount, it is advisable for the seller or buyer to use qualifying words, such as "more or less," "about," "nearly" or "say." If the goods sold are specific and in some definite bounds, as a room, building, vessel, car, train, or field, as corn in a corn-barn, the cargo of a ship, the grain standing in a certain field, or are to be supplied for a particular purpose during a specified time, the amount is regarded as an estimate merely, and great latitude is allowed in the meaning of qualifying terms, unless not made in good faith. In one case where the contract was for "all iron in the seller's yard, about 150 tons," a delivery of 44 tons, being all the iron in the yard, was performance of the contract. In other cases, the deviation must not be unreasonable. Where a contract was made to sell "about 300 quarters, more or less," of rye, the buyer could not be required to receive 350 quarters.

BY SELLER—DELIVERY—INSTALLMENTS.

42. In the absence of an express or implied agreement on the point, delivery cannot be made in installments.

In the absence of any agreement, express or implied, delivery cannot be made in installments. [See Appendix A, Uniform Sales Act, §45 (1).] Such a method of delivery would be implied if there was a usage to that effect, or a former course of dealing, or if the quantity was so large as clearly to indicate that the seller would not be able to deliver the entire amount at one time or the buyer would be unable to receive it.

If the buyer has a right to reject the goods for any reason, he should state that reason; for if he give an incorrect one the court may not allow him afterwards to allege some other reason although the latter would have been valid. Thus, where

there was an agreement to deliver goods in June but they were not tendered until August when they were refused on the ground of unmerchantability, the buyer, being defeated on the claim of lack of merchantability, was not allowed afterwards to urge the delay as the reason for his rejection.

BY SELLER—DELIVERY—KINDS.

43. Delivery may be—
- Actual, which is bodily passing the goods.
- Constructive, which is that presumed by law; and may occur—
  - If actual delivery would be an idle ceremony; as where the goods are—
    - Already in the possession of the buyer.
    - In the possession of a third person.
    - Left with seller to hold for the buyer (usually not sufficient as to third persons).
  - If actual delivery would be impracticable; as where the goods are—
    - Ponderous articles.
    - Inaccessible articles.
    - Growing crops.
- Symbolical, which is by delivery of something as representing the goods; which may be—
  - A part of a mass for the whole.
  - A key to the place where the goods are.
  - A document of title.

Delivery may be actual, constructive, or symbolical. Actual delivery is the manual tradition or bodily passing of the goods. Constructive and symbolical delivery arise when actual delivery would be impracticable, or an unnecessary formality, Constructive delivery is that presumed by law where the parties have done all they reasonably could be

expected to do to indicate their intention to transfer possession; and it is allowed in the case of ponderous bodies (See Appendix C, Case No. 13), as a block of marble, in the case of articles not easily accessible, as logs floating in a river, in the case of growing crops whose value would be destroyed by actual delivery, and in the case of goods already in the possession of the buyer or of a third person. (See Appendix C, Case No. 8.) In the last case the law does not require the idle ceremony of a return of the goods to the seller in order that he may hand them over to the buyer; and notice to a third person in possession, of a change of ownership is sufficient unless the person in possession refuse to acknowledge the rights of the buyer. Notice, however, to such third person would be sufficient even without his consent if the sale were a mere assignment of the seller's rights; and, in any case, it is sufficient as to everyone except the seller and buyer. [See Appendix A, Uniform Sales Act, §43 (3).] Constructive delivery is also made where the seller, by agreement, retains possession of the goods for the buyer, though, as has been seen, this would not be sufficient to affect the rights of third persons without notice.

Symbolical delivery is the delivery of something as a representative of the goods; as where a large number of small boxes are sold, and the seller, taking a few, hands them to the buyer, the few being intended by the parties to represent all. Whether such a delivery would be sufficient as to third persons without notice might depend upon the difficulty of making actual delivery and the location of the goods. Where the goods are in a locked building or room, delivery of the key to such building or room to the buyer is delivery of the goods to him; but delivery of a key would not be sufficient as to third persons if the article could have been as conveniently delivered as the key. Thus, if a sale be made of a watch which, with other articles, is in

a small box where the seller and the buyer are, delivery of a key to the box would not be a delivery of the watch so as to affect the rights of third persons, if the seller could as easily have unlocked the box and handed the watch to the buyer; for while the law does not require any unreasonable or unusual act on the part of the seller or buyer when delivery is made, the law usually will not allow constructive or symbolical delivery to be substituted for actual delivery when the rights of third persons are involved and actual delivery would be practicable and the ordinary method of accomplishing the transfer. (See Appendix C, Case No. 23.) In other words, the student must bear in mind that what constitutes delivery as between the seller and the buyer may not be delivery so as to affect the rights of third persons, and *vice versa*. Even where constructive or symbolical delivery is sufficient at the time, it is advisable to make actual delivery if it later should become practicable.

Another method of symbolical delivery is by giving a bill of sale where the article is large, or absent, or the seller is to retain possession of the goods for the buyer. To protect himself against third persons, the buyer should take and record a bill of sale where third persons are likely to be misled by absence of actual delivery.

BY SELLER—DELIVERY—DOCUMENTS OF TITLE.

44. A Document of Title is any instrument signed by the possessor of goods described therein, stating the right of another to receive them.

A document of title may provide for delivery of the goods described therein, to—

A designated person.

The order of a designated person.

Bearer.

The two most common documents of title are—
Bills of Lading.
Warehouse Receipts.

Generally the holder of a document of title does not have any greater right to the goods described therein than actual possession of the goods themselves would give him.

Symbolical delivery may also be made by the transfer of a Document of Title. The two most common documents of title are bills of lading and warehouse receipts. (See Appendix A, Uniform Sales Act, §76.)

A Bill of Lading is an instrument acknowledging the receipt of goods described therein, and containing a contract to transport them. It may be either a "straight" bill of lading or an "order" bill of lading. A straight bill of lading provides that the goods described therein are to be delivered to a specified person; while an order bill of lading provides that the goods will be delivered to *the order of* a specified person.

A Warehouse Receipt is an instrument issued when goods are received for storage. As in the case of a bill of lading, it may provide for delivery of the goods either to a specified person or to the order of a specified person.

While it is not usual for a document of title to provide for delivery of the goods to "bearer," there is nothing improper in such a provision; and in that case it can be transferred by merely handing it to someone with an intention to transfer the ownership of the goods described therein; but if the document provide for delivery to the order of a specified person, such person must indorse the document, which may be accomplished by writing his signature on the back. (See Appendix A, Uniform Sales Act, §29.) If he should write over his signature instructions to deliver the goods to some other designated person, such person in turn

would be required to indorse the document in order to transfer the title, and thus it could be indorsed successively through several hands; but if the person named in the document of title, or anyone to whom it has been indorsed at any time, should write his signature on the back without any qualifications, such indorsement would have the same effect as if the document had originally provided for delivery of the goods to bearer, as any subsequent holder would have the right to write instructions over such signature that the goods were to be delivered to him. Any rightful holder of a document of title calling for delivery to "bearer" can indorse it to himself so that it cannot afterwards be fully transferred without his indorsement. (See Appendix A, Uniform Sales Act, §28.)

Where a document of title is issued to the order of a specified person, the party issuing it cannot safely deliver the goods without a surrender of the document; otherwise such party might be held liable for non-delivery to some person to whom it had been transferred for value. If the document has been lost or destroyed, the person entitled to the goods can be required to give security to protect the party who issued it, before the latter can be required to surrender possession of the goods.

A document of title issued to a designated person but not to his order can be assigned; but in such a case the party issuing it must be notified of such transfer; otherwise he would be protected if, in good faith, he delivered the goods to the person from whom they were received, although the document of title was not exhibited when the goods were re-delivered. Likewise, prior to notice to the party issuing the document, the goods could be levied upon or attached by the creditors of the person to whom the document was issued; and he could give good title to a sub-buyer who bought in good faith, provided such sub-buyer notifies the

party issuing the document, before the assignee of the document does so. (See Appendix A, Uniform Sales Act, §34.) The same rules would govern as between the assignee of the document and a sub-assignee.

If a document of title calls for delivery of the goods to the order of a specified person, or it is indorsed to a designated person, and the person so entitled to receive the goods transfers the document for value without indorsement, the transfer is valid between the parties although the person issuing the document might not be under any duty to recognize the rights of the transferee without indorsement.

A document of title, being merely a symbol for specific goods, generally cannot give the holder any greater rights than possession of the goods themselves would have given; he takes such title only as his transferror had. Thus, if goods are stolen, the mere fact that the thief might store them in a warehouse and take a receipt to his order which he transfers to someone who acquires it for value and in good faith, will not give the transferee any greater right to the goods than if he had acquired possession of the goods by actual delivery from the thief. (See Appendix A, Uniform Sales Act, §33.) The true owner would not be prevented from taking his goods. However, a levy or attachment made on goods for which a document of title calling for delivery to bearer or order has been issued can be defeated by the debtor transferring such document to someone for value without notice. (See Appendix A, Uniform Sales Act, §39.) The creditor, in such a case, must obtain possession or control of the document in some way while his debtor is the holder; and the creditor is entitled to aid by injunction to accomplish this end. (See Appendix A, Uniform Sales Act, §40.)

BY SELLER—TENDER.

45. If the buyer intends not to perform his contract, the seller should put the buyer in default by tendering the goods to him.

A Tender of Goods by the seller generally consists of the following elements:

Readiness to deliver.
Ability to deliver.
Willingness to deliver.
Notice to the buyer that the seller is ready, able, and willing to deliver upon performance by the buyer of his part of the contract.

If the buyer refuse to perform his contract, the seller should tender the goods. Tender of goods is different from a tender of money. Tender by a seller consists of four things: readiness to deliver, ability to deliver, willingness to deliver, and notice to the buyer that the seller is ready, able, and willing to deliver upon the buyer in turn performing his part of the contract. The seller is not required to go to the expense and trouble of carrying the goods to the buyer, nor of keeping the tender good.

BY BUYER—ACCEPTANCE.

46. It is the duty of the buyer to accept the goods tendered by the seller if they conform to the terms of the contract.

Before accepting the goods the buyer has a right to examine them, and, if necessary, to test them, unless he previously has done these things.

A defective delivery by the seller does not necessarily entitle the buyer to refuse acceptance of a subsequent delivery which conforms to the terms of the contract.

Acceptance is the complement of delivery. It is the duty of the buyer to accept the goods if he has no legal excuse for not doing so; and acceptance may occur before or after receipt. Before accepting them he has a right to examine them, even though sent by a carrier, unless the buyer previously has examined them. (See Appendix A, Uniform Sales Act, §47.) (See, also, Appendix C, Case No. 17.) If necessary, the buyer may use a reasonable quantity to test the goods without liability for the part destroyed in making the test. In one case the use of 42 out of 300 barrels of whiting for making putty was held reasonable; while in another case the use of 20 gallons of cider, being about one-sixth of the entire quantity, was held to be unreasonable and indicated acceptance. The expense of testing is to be borne by the buyer in the absence of any agreement on the point.

A delivery made by the seller which, for some reason, is not a compliance with the terms of the contract is not necessarily a breach thereof; hence, although the buyer has rightfully rejected a tender made by the seller, the latter is not prevented from making further efforts to carry out his agreement, and if a subsequent tender complies with the terms of the contract, it is the duty of the buyer to accept it. Thus, if the seller should send the wrong quantity, which is refused by the buyer for that reason, the seller later might perform his contract by sending the right quantity. However, if a defective delivery is made under such circumstances as would justify the belief that it is the only delivery the seller intends to make, and, after rejecting it, the buyer supplies his wants elsewhere, he is not under any duty to accept a subsequent tender. Of course if the defect in delivery results from its being made after the time for performance has passed, the goods being rejected by the buyer on that account, such defect would not be subject to correction.

The question of delivery and acceptance arises in several different situations. Delivery to the buyer frequently is conclusive on the point whether ownership has passed to him, and whether he must bear the risk of loss of or damage to the goods. Delivery to the buyer is likewise very important in deciding the rights of third persons. Acceptance by the buyer becomes important when it would cause an oral contract of sale to become enforceable. Again, the matter of delivery and acceptance must be considered when deciding whether a party to a contract of sale has fully performed its terms. In all these cases there is much similarity as to what constitutes delivery and acceptance, yet sometimes much depends upon the point involved; thus, delivery which would be sufficient between the parties would not be sufficient when some third person claims an interest in the goods. This makes it impracticable to discuss, in one place, all the requisites of delivery and acceptance; and space will not allow of repetition each time these points arise. In this chapter delivery and acceptance are considered only so far as they are regarded as full performance of the terms of the contract by the parties; and the student, having regard to the particular question involved, must refer to other chapters where these points have arisen, to obtain additional information thereon.

BY BUYER—PAYMENT.

47. It is the duty of the buyer to pay for the goods in accordance with the terms of his contract.

In the absence of an express or of an implied agreement to the contrary, delivery of the goods and payment of the price are concurrent conditions.

Frequently the parties agree as to the exact time payment of the price is to be made. Although it is not usual

for the buyer to agree to pay the price before delivery of the goods, an agreement to pay on a designated day is valid even though the seller has not delivered the goods, unless previous delivery of the goods was intended.

It is quite common for the parties to agree that payment of the price, either in whole or in part, may be made some time after delivery of the goods to the buyer, such agreement being known as a sale on credit.

In the absence of any agreement when the price is payable, the law implies that it is to be paid upon acceptance of the goods, that is, delivery of the goods by the seller and payment of the price by the buyer are concurrent conditions; and, upon refusal of performance by one the other can refuse to perform in turn. Practically there is some interval, however short, between delivery and payment. Usually the goods are either handed to the buyer, who thereupon pays, or the buyer pays, after which the goods are handed to him.

When the price is due, and the seller refuses to perform the contract, the buyer can put the seller in default by making a tender of payment, such a tender being governed by the rules applicable to a tender of money.

CHAPTER VII.

REMEDIES.

48. In General.
49. Of Seller—How Enforced.
50. Of Seller Against Goods.
51. Of Seller—Lien—Effect.
52. Of Seller—Lien—Loss.
53. Of Seller—Right of Stoppage.
54. Of Seller—Resale.
55. Of Seller—Action for Price.
56. Of Seller—Action for Damages.
57. Of Buyer—Replevin—Trover.
58. Of Buyer—Damages for Non-Delivery or for Delay.
59. Of Buyer—Breach of Warranty—Measure of Damages.
60. Of Buyer—Breach of Warranty—How Enforced.
61. Of Buyer—Breach of Warranty—Who Liable for.
62. Of Buyer—Special Damages.

IN GENERAL.

48. If either party does not perform the contract of sale, the law gives some remedy to the other party who has done all the contract legally requires of him.

As in the case of any contract, if either party to a sale wrongfully refuses or neglects to perform its terms, the injured party, not being likewise in default, is afforded means for compelling performance.

OF SELLER—HOW ENFORCED.

49. If the buyer does not perform the contract of sale, the seller may have several remedies, some of which may be enforced through the goods themselves and some by an action against the buyer personally.

If the buyer does not perform his contract and the seller has done all that he is required to do, the seller may have several remedies depending on the circumstances. Some of these remedies are enforced through the goods themselves, others against the buyer personally. Two or more remedies may exist at the same time, resort to one not precluding subsequent recourse to another as long as the seller remains unpaid.

OF SELLER AGAINST GOODS.

50. The remedies of an unpaid seller enforceable through the goods themselves are the—

Seller's Lien.
Right of Stoppage in Transitu.
Right of Resale.

The three common remedies of an unpaid seller which are enforced through the goods themselves are the seller's lien, the right of stoppage *in transitu,* and the right of resale. These will be considered in order.

OF SELLER—LIEN—EFFECT.

51. Unless contrary to some express or implied term in the contract, an unpaid seller can withhold delivery of the subject-matter of the sale if the ownership thereof has passed to the buyer.

Probably the remedy most frequently employed by a seller to compel performance by the buyer is to withhold delivery of the subject-matter of the sale until the price therefor has been paid, thus enforcing what is known as the "unpaid seller's lien." (See Appendix A, Uniform Sales Act, §54.)

"Lien" is used in two senses—one being very broad and including all means for enforcing a right through property, real or personal, whether such right has arisen under the common law or by virtue of some statute; but its narrow, original and proper sense is the mere right to retain possession of the personal property of another until some debt or charge is satisfied, or some other legal duty owed to the person in possession has been performed, such claim usually being connected with the goods on which the lien is claimed. An unpaid seller has a lien in the strict sense of the word.

The unpaid seller's lien arises only where the ownership in the goods has passed to the buyer; for if the ownership has not passed, the goods still belong to the seller, and he cannot have a lien on his own property. In such a case he merely would retain possession of his own goods and would have a right of action against the buyer.

OF SELLER—LIEN—LOSS.

52. An unpaid seller's lien may be lost by—
Voluntary surrender of possession.
Tender of the price by the buyer.
Waiver.

The seller's lien may be lost in three ways—by voluntarily yielding possession of the goods, by a tender of their price, and by waiving it. (See Appendix A, Uniform Sales Act, §56.) A lien in the strict sense cannot exist without possession, for it is withholding possession of something that another person wants, which makes a lien of any value

as a remedy. If possession of the goods wrongfully be taken from the seller without his consent, he would have a right to regain such possession and his lien would at once re-attach; and the rule is the same if possession has been obtained by fraud, unless innocent third persons have in the meantime acquired some rights to the goods. If the seller hands over the goods to the buyer with rightful expectation of immediate payment which is not made, the seller can re-possess himself of the goods; and unnecessary delay in doing so would cause a loss of his lien.

If the buyer tender all that is owing the seller, although the seller may not admit that it is sufficient in amount, the lien is at once lost, the buyer having done all that the law requires of him, and, being no longer in default, is entitled to possession. The seller then would become the party in default if he continues to withhold delivery. If the buyer tenders the price, which is accepted, the seller ceases to be an unpaid one, and, hence, there is no longer any occasion for a lien. The seller's lien will not cover any other claim than the price of those particular goods withheld, and after payment or tender of such price, the seller cannot refuse delivery because the buyer owes him on some other account, unless there was an agreement to that effect.

The seller's lien extends to all of the goods for every cent of the unpaid price, and not proportionately. (See Appendix A, Uniform Sales Act, §55.) Thus, where sixteen cattle were sold for $400 and the buyer, upon paying $350, took six of them, the seller could retain the remaining ten until paid the balance of $50.

An unpaid seller will waive his lien by any act on his part which is inconsistent therewith. The most common method of waiving is by giving credit to the buyer; but this waiver is made on two conditions, usually implied, that the buyer's credit will remain good, and that he will pay when

the term of credit has expired. Thus, if goods are sold to be paid for in one month but with the intention of allowing the buyer to take immediate possession, and the buyer, for some reason, leaves the goods with the seller, who sometime during the month discovers that the buyer is insolvent, the seller can withhold delivery; and, at the expiration of the month, the seller could refuse delivery whether the buyer was then insolvent or not. An extension of credit to the buyer for a part of the price will not prevent the seller from asserting his lien as to the balance of the unpaid price which is due at once. The unpaid seller's lien is waived by consenting to a resale or pledge of the goods by the buyer with the expectation of immediate delivery to the sub-buyer or to the pledgee.

The unpaid seller's lien is not waived by his taking other steps to enforce payment by the buyer as long as the seller's claim is not satisfied.

OF SELLER—RIGHT OF STOPPAGE.

53. An unpaid seller has a right to stop all or a portion of the goods while in transit to the buyer, although the ownership is in the buyer and the sale was on credit, provided the seller learns for the first time of the buyer's actual or apparent insolvency, after parting with possession.

Insolvency means actual or apparent inability of a person to pay his debts as they become due in the ordinary course of business.

Transit begins as soon as the goods are placed by the seller in the possession of a carrier or other bailee for transmission to the buyer; and ends when such carrier or other bailee makes actual or constructive delivery to the buyer.

The right of stoppage is exercised by giving notice, however informal, either to the carrier or other bailee, or to his employee in actual custody. Notice not given to the person in actual custody must be given in time for its transmission by reasonable diligence, to the person in custody.

The carrier or other bailee must respect a notice from the seller to stop the goods, responsibility for a wrongful stoppage resting entirely on the seller.

The only way the right of stoppage can be defeated is where innocent third persons have acquired rights in the goods with the consent of the seller, as where he has delivered documents of title to the goods to the buyer who transfers them to someone under such circumstances that the latter can compel delivery of the goods by the carrier.

Another remedy given to an unpaid seller, which is enforced through the goods, is known as the right of stoppage *in transitu.* (See Appendix A, Uniform Sales Act, §57.) As has been seen, the general rule is that delivery to a carrier for transmission to the buyer is regarded as delivery to the buyer, so that ownership of the goods passes to him, in which case the unpaid seller's lien would be lost; but the courts, considering it unjust for one person's goods to be taken to satisfy another person's debts, have given an unpaid seller the unusual remedy of stopping the goods while on the way to the buyer and ordering the carrier, or any other person in possession, to return them, if, after parting with the goods the unpaid seller for the first time learns that the buyer is actually or apparently insolvent. It makes no difference that the buyer was insolvent before delivery of the goods to the carrier if the seller does not learn of it until afterwards; but if the seller, at the time he parted with possession, knew of the buyer's insolvency, the right of stoppage would not exist.

"Insolvency" has different meanings; but, as used here, it means ceasing to pay debts in the ordinary course of business, or apparent inability to pay them, although the debtor may not be bankrupt, and the assets of the buyer may exceed his liabilities. [See Appendix A, Uniform Sales Act, §76 (3).] The fact that a person might not be able to pay his debts if all were presented at once does not necessarily indicate insolvency. A person will be regarded as apparently insolvent if he allows his note to be protested, or suffers his property to be attached. The right of stoppage does not exist if the buyer is neither actually nor apparently insolvent at the time the seller wishes to stop them.

The right of stoppage *in transitu* is not taken away merely because the sale was made on credit.

Transit begins as soon as the goods leave the possession of the seller for transmission to the buyer, although not yet in motion, as where goods have been delivered at a freight-depot of a railway company. [See Appendix A, Uniform Sales Act, §58 (1) (*a*).] Goods while temporarily stored in a warehouse at any point are treated as being in transit if such storage is merely one step in forwarding the goods to the buyer.

As soon as the buyer takes possession of the goods, although at some other point than the place of destination, the right of stoppage is gone. [See Appendix A, Uniform Sales Act, §58 (2) (*a*).] (See, also, Appendix C, Case No. 26.) If the buyer has taken possession of a part only, the remainder can be stopped and held for the entire balance unpaid. [See Appendix A, Uniform Sales Act, §58 (4).]

Arrival of the goods at the place of destination does not alone terminate the transit (See Appendix C, Cases No. 27 and 28); but if, after the goods have reached the point of destination named by the seller, and the buyer has been notified by the carrier of their arrival, and the carrier is

directed by the buyer to hold the goods (See Appendix C, Case No. 29), as he intends to forward them to another point, the possession of the carrier then becomes possession by the buyer—the transit is at an end and the right of stoppage gone, although the buyer intends not to take the goods from the carrier's possession before forwarding them. [See Appendix A, Uniform Sales Act, §58 (2) (*b*).]

If the buyer refuses to receive the goods from the carrier, and the seller denies the right of the buyer to reject them, the possession of the carrier is not possession by the buyer; and the seller, subsequently learning of the insolvency of the buyer, can change his mind and order the carrier not to deliver the goods. [See Appendix A, Uniform Sales Act, §58 (1) (*b*).]

If the goods reach the point of destination and are claimed by the buyer, but the carrier wrongfully refuses delivery, the transit is at an end and the right of stoppage is gone. [See Appendix A, Uniform Sales Act, §58 (2) (c).]

If the buyer should also be the carrier, the seller's right of stoppage depends largely upon the character of the buyer's possession. Generally, in such a case, delivery to the carrier would be equivalent to possession being taken by the buyer, but it would be otherwise if the contract called for delivery to the buyer at some other point, and placing the goods on his conveyance was regarded by the parties the same as delivery to any other carrier would have been.

The right of stoppage is exercised by giving notice to the carrier, or by the seller repossessing himself of the goods. Notice to the carrier may be to the employee in actual custody of the goods, or to his employer; but if given to the employer it must be in time to allow of transmission of instructions to the employee in actual custody. [See Appendix A, Uniform Sales Act, §59 (1).]

Notice need not be formal but the goods must be described sufficiently for identification. The carrier is bound to obey instructions to stop, as soon as he is satisfied that they came from a proper source, although the seller may not be legally right in stopping the goods. [See Appendix A, Uniform Sales Act, §59 (2).] The remedy of the buyer for a wrongful stoppage is against the seller and not against the carrier.

After the goods are rightfully stopped, it is the duty of the carrier to return them to the seller if so directed and the freight charges are paid. As soon as the seller regains actual possession he is in the same position legally as he was before he parted with possession—his lien revives, and the parties have the same rights under their contract as before. The seller can bring suit for the price; and the buyer, by tendering the price, is entitled to possession of the goods.

The only way the right of stoppage can be defeated is where third persons have acquired rights in the goods with the consent of the seller or where the buyer, rightfully in possession of documents of title thereto, has transferred them at any time to someone under such circumstances as to give the transferee a right to receive the goods from the carrier. (See Appendix A, Uniform Sales Act, §62.)

If the seller, in any of the methods heretofore discussed, has reserved control over the goods while in transit, there is no occasion for the exercise of the right of stoppage, as such right does not become important unless the ownership of the goods, while in transit, is in the buyer.

OF SELLER—RESALE.

54. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price

an unreasonable time, an unpaid seller, having a right of lien or having stopped the goods in transitu, may resell them.

A third remedy which an unpaid seller can enforce through the goods on which he has a lien is to resell them if they are perishable, or if he has reserved such right, or the buyer has been in default an unreasonable time. This right should be exercised fairly and in good faith. (See Appendix A, Uniform Sales Act, §60.) To avoid a charge of unfairness it is prudent, unless the perishable nature of the goods requires prompt action, for the seller to give the buyer notice of the time and place of sale, and to sell at public auction, and for the seller himself not to become the purchaser. The seller need not resell on credit although a higher price might thereby be obtained.

The proceeds of a resale are applied, first, to the reasonable expenses in conducting the sale, though the seller cannot charge for his own services. If the balance is not sufficient to pay the seller's claim, the buyer is liable for the deficiency; if there should be any excess, which would be unusual, it would belong to the buyer.

OF SELLER—ACTION FOR PRICE.

55. If the price, or any part of it, is due and the buyer wrongfully neglects or refuses to pay it, the seller can bring an action therefor although still in possession of the goods.

The remedy of an unpaid seller against the buyer personally is similar to that arising on the breach of any contract, and exists whether the seller remains in possession of the goods or not. [See Appendix A, Uniform Sales Act, §63 (1).] If the ownership of the goods has passed to the

buyer, the seller can maintain an action for the price, though he cannot bring an action until the term of credit, if any, has expired. The seller is not required to keep possession of the goods for the buyer, but can store them for him.

If, under the agreement, the price was to be paid on a fixed date, the price can be recovered although the goods have not been ascertained, unless it can be shown that the seller is manifestly unable to perform the contract or intends not to perform it. [See Appendix A, Uniform Sales Act, §63 (2).]

OF SELLER—ACTION FOR DAMAGES.

56. If the buyer wrongfully refuses or neglects to accept goods tendered by the seller in performance of the contract, the seller can recover damages from the buyer for non-performance of the contract.

Generally, the measure of such damages is the excess of the contract-price over the market-price at the place of delivery, at the time when the goods ought to have been accepted; or, if a time for acceptance was not fixed, then at the time of the refusal to accept. In any event nominal damages are recoverable.

If the ownership has not passed and the buyer wrongfully refuse to accept goods tendered by the seller, the remedy is to recover damages for a breach of the contract, the measure of damages being the difference between the contract-price and the current or market-price at the time and place of delivery, or, if no time was fixed, then at the time of the refusal to accept, provided the market-price is lower than the contract-price; for the amount thus obtained added to the price obtainable in open market will theoretically place the seller in the same financial situation as if the buyer had paid. If the market-price be equal to or greater

than the contract-price, the seller could recover nominal damages in any event, although he has not sustained any actual loss; and the same result would follow if a price had not been named in the contract, as the law implies a reasonable price, which would be equal to the market-price.

If the market value be unnaturally inflated or depressed, it is not a true test. (See Appendix C, Case No. 2.)

If there is no actual market-price at the place of delivery, it is fixed by the price at the nearest available market, with allowance for the cost of transportation between the points.

OF BUYER—REPLEVIN—TROVER.

57. If ownership of the goods has passed to the buyer, he can recover actual possession thereof by an action of replevin; or he can recover damages in an action of trover, if the seller wrongfully neglects or refuses to deliver the goods or has consumed or otherwise disposed of them.

If the seller is the one who fails to perform the contract, the buyer may have several remedies, depending on circumstances.

If the ownership of the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver them, and the buyer wishes actual possession, he can acquire it by an action of replevin. The buyer also can treat the seller's acts as a wrongful exercise of ownership over the goods, and can bring an action for damages based on such tort. (See Appendix A, Uniform Sales Act, §66.) If a judgment for damages be recovered against the seller which he pays, the seller will then become the owner of the goods, his title to, and his rights in, the goods relating back to the time his possession began to be wrongful.

OF BUYER—DAMAGES FOR NON-DELIVERY OR FOR DELAY.

58. If the ownership of the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to make delivery, the buyer can recover damages from the seller for such non-performance of the contract.

Generally the measure of damages is the excess of the market-price over the contract-price at the time and place of delivery; or, if a time for delivery was not fixed, then at the time of the seller's refusal to deliver. In any event nominal damages are recovable.

If the seller has unreasonably delayed delivery of the goods, the buyer can recover such damages as he may have sustained as the direct result of such delay.

If the ownership of the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to make any delivery, the buyer can sue the seller for damages for such breach of the contract; and the measure of such damages would generally be the excess of the market-price of the goods, at the time and place of delivery, over the contract-price, for this difference, added to what the buyer agreed to pay, theoretically enables him to acquire the goods in open market without loss. If no time is fixed for delivery, the market-price at the time of the seller's refusal to deliver is taken. [See Appendix A, Uniform Sales Act, §67 (3).] Although the contract-price might be equal to or greater than the market-price, or a price was not agreed upon, the buyer can recover nominal damages.

The fact that the buyer may have paid the price does not in any way affect the basis for determining the damages recoverable by him; for, in such a case, if the seller wrong-

fully refuses to deliver the goods, the measure of damages is not the amount previously paid by the buyer, as he may have paid more than the value of the goods at the time fixed for delivery. The market-value fixes the damages in this case as well as in any other, as the buyer by recovering that amount can procure similar goods in the open market and thus will be in the same position as if the seller had performed his contract.

If the seller delivers the goods after the time called for in the contract, the buyer can waive his right to refuse to receive them, and can recover such damages as reasonably resulted from the delay. (See, Contracts, Case No. 60.)

Where payment would be due at once from the buyer on performance of the contract by the seller, the buyer, in order to hold the seller, should make tender of the price and keep it good.

OF BUYER—BREACH OF WARRANTY —MEASURE OF DAMAGES.

59. The buyer has a right of action for the breach of any warranty given him by the seller.

The measure of damages for a breach of warranty is generally the difference between the actual value of the article as it is and what its value would be if it were as warranted.

After acceptance of the goods, the buyer has a right of action if any warranty has been broken, the measure of damages being generally the loss directly resulting from the breach; or, in any event, nominal damages. (See Appendix A, Uniform Sales Act, §69.)

If the warranty relates to kind, quality or condition, the measure of damages is the difference between the value of the article as it is and the value of the article as it should

have been. (See Appendix C, Case No. 15.) Thus, if a diseased horse, warranted sound, is worth forty dollars, but would have been worth fifty dollars if sound, the buyer can recover ten dollars, that being the extent of the injury sustained by him. The fact that the buyer may have resold the horse without loss is immaterial. Thus, if the buyer paid forty dollars for the horse and resold it for sixty, the amount recoverable for the breach of warranty is not changed thereby, as the buyer is entitled to any advantage of any low price he may have succeeded in obtaining; and if the horse had been sound, as warranted, the buyer might have sold it for more than he did. The material point is the difference between the actual value of the defective horse and its value if it had been sound. The amount recoverable does not depend on his reselling the property. Likewise, the amount recoverable is not affected by the fact that he has given a note for the price, which is unpaid.

If the warranty broken be one against incumbrances, the buyer has the right to discharge any valid existing incumbrance, as a mortgage; and the amount so paid is the measure of damages for the breach of the warranty.

OF BUYER—BREACH OF WARRANTY—HOW ENFORCED.

60. The buyer can bring suit to recover such damages as directly result from a breach of warranty; or, if he has not paid the price, he can wait until he is sued and then recoup such damage in diminution or extinction of the seller's claim.

The buyer can bring an independent action to recover damages arising from a breach of warranty; or, if he has not paid the price, he can wait until he is sued therefor, and then recoup his damages in reduction, or sometimes to the complete extinction, of the seller's claim.

OF BUYER—BREACH OF WARRANTY—WHO LIABLE FOR.

61. As a general rule, the only person who can be held liable by the buyer of goods for a breach of warranty thereof is the person from whom he bought the goods.

A buyer generally has no claim for a breach of warranty given by any seller of the goods prior to the one from whom he bought, as there was no contract between him and any former owners; that is, a warranty does not "run with the goods," therein differing from some warranties in regard to real estate. Thus, if *A*, without title, sold to *B*, and *B* resold to *C*, and the property is taken from *C* by the rightful owner, *C* could not hold *A* on his implied warranty of title to *B*.

If the sub-buyer recovers damages from the buyer for a breach of warranty, the buyer might hold the seller in turn, thus the sub-buyer would indirectly have recourse to the seller.

If the seller expressly should warrant the goods to sub-buyers, he would be directly liable to them, there then being a direct contract on this point, although no direct sale; as where the manufacturer of some remedy expressly warrants that certain effects will result to its users although not direct purchasers from him.

If the seller, guilty of a tort, sells with the expectation that the buyer will resell the goods to others who may suffer as the direct result of such tort, the injured person can recover from the guilty person. Thus, if the manufacturer of a step-ladder, through negligence, makes one that is so defective as to cause direct injury to a sub-buyer making proper use of it, the manufacturer would be liable to the sub-buyer. In such a case, however, the action is based on the tort and not on a warranty arising from a sale.

OF BUYER—SPECIAL DAMAGES.

62. If the seller knew of circumstances likely to occasion the buyer a direct loss, if the contract be broken, in excess of that ordinarily flowing from a breach, the buyer can recover special damages.

Where the buyer, when ordering goods, makes known to the seller that they are wanted for some particular purpose, and the seller knows, or ought to realize, that a breach of the contract would cause the buyer some unusual and direct loss in addition to the damages which would naturally result, the buyer then would be entitled to recover special damages to reimburse him for such loss. (See Contracts, Case No. 61; and Appendix C, Case No. 30.) Thus where material was ordered to be delivered at a certain time for a sewer in process of construction, and the seller knew that delay would cause the buyer's employees to be idle during such delay, the buyer can recover special damages covering the wages of such idle workmen.

Should the student desire to extend his knowledge of the law of Sales, he can read Tiffany on Sales (second edition) with advantage; or, if he wishes a still larger work, Williston on Sales.

APPENDIX A.

UNIFORM SALES ACT.

The following code is in force at the present time in the following jurisdictions: Alaska, Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Wisconsin. No doubt many more will be added to the list within the next few years.

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PART I.

FORMATION OF THE CONTRACT.

Section 1.—[Contracts to Sell and Sales.] (1.) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2.) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3.) A contract to sell or a sale may be absolute or conditional.

(4.) There may be a contract to sell or a sale between one part owner and another.

Section 2.—[Capacity—Liabilities for Necessaries.] Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

Formalities of the Contract.

Section 3.—[Form of Contract or Sale.] Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Section 4.—[*Statute of Frauds.*] (1.) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Subject-Matter of Contract.

Section 5.—[*Existing and Future Goods.*] (1.) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2.) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6.—[*Undivided Shares.*] (1.) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force

of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2.) In the case of fungible goods there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 7.—[*Destruction of Goods Sold.*] (1.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(*a.*) As avoided, or

(*b.*) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8.—[*Destruction of Goods Contracted to be Sold.*] (1.) Where there is a contract to sell specific goods, and subsequently but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in

quality as to be substantially changed in character, the buyer may at his option treat the contract—

(*a.*) As avoided, or

(*b.*) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

The Price.

Section 9.—[Definition and Ascertainment of Price.] (1.) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2.) The price may be made payable in any personal property.

(3.) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10.—[Sale at a Valuation.] (1.) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

Conditions and Warranties.

Section 11.—[Effect of Conditions.] (1.) Where the obligation of either party to a contract to sell or a sale is sub-

ject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2.) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 12.—[*Definition of Express Warranty.*] Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13.—[*Implied Warranties of Title.*] In a contract to sell or a sale, unless a contrary intention appears, there is—

(1.) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3.) An implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4.) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Section 14.—[*Implied Warranty in Sale by Description.*] Where there is a contract to sell or a sale of goods by descrip-

tion, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Section 15.—[*Implied Warranties of Quality.*] Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or the manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2.) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3.) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4.) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6.) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Sale by Sample.

Section 16.—[*Implied Warranties in Sale by Sample.*] In the case of a contract to sell or a sale by sample:

(*a.*) There is an implied warranty that the bulk shall correspond with the sample in quality.

(*b.*) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the

sample, except so far as otherwise provided in section 47 (3).

(*c.*) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART II.

TRANSFER OF PROPERTY AND TITLE.

Transfer of Property as Between Seller and Buyer.

Section 17.—[*No Property Passes until Goods are Ascertained.*] Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

Section 18.—[*Property in Specific Goods Passes When Parties so Intend.*] (1.) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Section 19.—[*Rules for Ascertaining Intention.*] Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1.) When goods are delivered to the buyer "on

sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2.) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(*a.*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(*b.*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1.) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a par-

ticular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 20.—[Reservation of Right of Possession of Property when Goods are Shipped.] (1.) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading

indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21.—[*Sale by Auction.*] In the case of sale by auction—

(1.) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3.) A right to bid may be reserved expressly by or on behalf of the seller.

(4.) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22.—[*Risk of Loss.*] Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(*a.*) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery.

(*b.*) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Transfer of Title.

Section 23.—[*Sale by a Person not the Owner.*] (1.) Subject to the provisions of this act, where goods are sold by

a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Nothing in this act, however, shall affect—

(*a.*) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(*b.*) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Section 24.—[*Sale by One Having a Voidable Title.*] Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Section 25.—[*Sale by Seller in Possession of Goods already Sold.*] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Section 26.—[*Creditors' Rights against Sold Goods in Seller's Possession.*] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Section 27.—[*Definition of Negotiable Document of Title.*] A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

Section 28.—[*Negotiation of Negotiable Documents by Delivery.*] A negotiable document of title may be negotiated by delivery:

(*a.*) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(*b.*) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been endorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29.—[*Negotiation of Negotiable Documents by Indorsement.*] A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30.—[*Negotiable Documents of Title Marked "Not Negotiable."*] If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable," or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

Section 31.—[*Transfer of Non-Negotiable Documents.*] A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

Section 32.—[*Who May Negotiate a Document.*] A negotiable document of title may be negotiated—

(*a.*) By the owner thereof, or

(*b.*) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

Section 33.—[*Rights of Person to Whom Document Has Been Negotiated.*] A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(*a.*) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(*b.*) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34.—[*Rights of Person to Whom Document Has Been Transferred.*] A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35.—[*Transfer of Negotiable Document Without Indorsement.*] Where a negotiable document of title is transferred for value by delivery, and the indorsement of a transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36.—[*Warranties on Sale of Document.*] A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(*a.*) That the document is genuine.

(*b.*) That he has a legal right to negotiate or transfer it.

(*c.*) That he has knowledge of no fact which would impair the validity or worth of the document, and

(*d.*) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37.—[*Indorser not a Guarantor.*] The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Section 38.—[*When Negotiation not Impaired by Fraud, Mistake or Duress.*] The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person

making the negotiation, or by the fact that owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

Section 39.—[Attachment or Levy upon Goods for which a Negotiable Document Has Been Issued.] If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40.—[Creditors' Remedies to Reach Negotiable Documents.] A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

PART III.

PERFORMANCE OF THE CONTRACT.

Section 41.—[Seller Must Deliver and Buyer Accept Goods.] It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42.—[Delivery and Payment are Concurrent Conditions.] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer

must be ready and willing to pay the price in exchange for possession of the goods.

Section 43.—[Place, Time and Manner of Delivery.] (1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2.) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Section 44.—[Delivery of Wrong Quantity.] (1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the

seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Section 45.—[*Delivery in Installments.*] (1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

(2.) Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery or pay for one or more installment, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46.—[*Delivery to a carrier on Behalf of the Buyer.*] (1.) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2.) Unless otherwise authorized by the buyer, the seller

must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47.—[Right to Examine the Goods.] (1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3.) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48.—[What Constitutes Acceptance.] The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Section 49.—[Acceptance Does not Bar Action for Damages.] In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Section 50.—[Buyer is not Bound to Return Goods Wrongly Delivered.] Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

Section 51.—[Buyer's Liability for Failing to Accept Delivery.] When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Section 52.—[Definition of Unpaid Seller.] (1.) The seller of goods is deemed to be an unpaid seller within the meaning of this act—

(*a.*) When the whole of the price has not been paid or tendered.

(*b.*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2.) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 53.—[*Remedies of an Unpaid Seller.*] (1.) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

(*a.*) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b.*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(*c.*) A right of resale as limited by this act;

(*d.*) A right to rescind the sale as limited by this act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

Unpaid Seller's Lien.

Section 54.—[*When Right of Lien may be Exercised.*] (1.) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(*a.*) Where the goods have been sold without any stipulation as to credit;

(*b.*) Where the goods have been sold on credit, but the term of credit has expired;

(*c.*) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55.—[*Lien after Part Delivery.*] Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56.—[*When Lien is Lost.*] (1.) The unpaid seller of goods loses his lien thereon—

(*a.*) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(*b.*) When the buyer or his agent lawfully obtains possession of the goods;

(*c.*) By waiver thereof.

(2.) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

Section 57.—[*Seller may Stop Goods on Buyer's Insolvency.*] Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu,* that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Section 58.—[*When Goods are in Transit.*] (1.) Goods are in transit within the meaning of section 57—

(*a.*) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(*b.*) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2.) Goods are no longer in transit within the meaning of section 57:

(*a.*) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(*b.*) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and

continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(*c.*) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3.) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4.) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu,* unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Section 59.—[Ways of Exercising the Right to Stop.] (1.) The unpaid seller may exercise his right of stoppage *in transitu* either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

Resale by the Seller.

Section 60.—[When and How Resale May be Made.] (1.) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid

seller having a right of lien or having stopped the goods *in transitu* may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3.) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4.) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5.) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

Rescission by the Seller.

Section 61.—[When and How the Seller May Rescind the Sale.] (1.) An unpaid seller having a right of lien or having stopped the goods *in transitu*, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the

buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer has been in default an unreasonable time before the right of rescission was asserted.

Section 62.—[Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.] Subject to the provisions of this act, the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage *in transitu.*

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

Section 63.—[Action for the Price.] (1.) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3.) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods

are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Section 64.—[Action for Damages for Non-Acceptance of the Goods.] (1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4.) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section 65.—[When Seller May Rescind Contract or Sale.] Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

Remedies of the Buyer.

Section 66.—[Action for Converting or Detaining Goods.] Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods,

the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67.—[*Action for Failing to Deliver Goods.*] (1.) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Section 68.—[*Specific Performance.*] Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section 69.—[*Remedies for Breach of Warranty.*] (1.) Where there is a breach of warranty by the seller, the buyer may, at his election—

(*a.*) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.

(*b.*) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(*c.*) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(*d.*) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been re-

ceived, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2.) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3.) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4.) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5.) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7.) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Section 70.—[*Interest and Special Damages.*] Nothing

in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

INTERPRETATION.

Section 71.—[Variation of Implied Obligations.] Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Section 72.—[Rights May be Enforced by Action.] Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Section 73.—[Rule for Cases not Provided for by this Act.] In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Section 74.—[Interpretation Shall Give Effect to Purpose of Uniformity.] This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the laws of those states which enact it.

Section 75.—[Provisions not Applicable to Mortgages.] The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge or other security.

Section 76.—[Definitions.] (1.) In this act, unless the context or subject-matter otherwise requires—

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

(2.) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is solvent within the meaning of the federal bankruptcy law or not.

(4.) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

Section 77.—[*Inconsistent Legislation Repealed.*] All acts or parts of acts inconsistent with this act are hereby repealed.

Section 78.—[*Time When the Act Takes Effect.*] This act shall take effect on the day of one thousand nine hundred and .

Section 79.—[*Name of Act.*] This act may be cited as the Sales Act.

APPENDIX B.

FORMS.

No. 1. *Bill of Sale.*

KNOW ALL MEN BY THESE PRESENTS, That *I, George W. Clark* (First Party), of *Chicago* in the County of *Cook* and State of *Illinois,* for and in consideration of the sum of *Three Hundred and Seventy-five* (*$375.00*) Dollars, lawful money of the United States of America, to said First Party in hand paid at or before the ensealing and delivery of these Presents by *Douglas L. Hunt* (Second Party), the receipt of which sum by said First Party hereby is acknowledged, have granted, bargained, sold and delivered, and by these Presents do grant, bargain, sell and deliver unto said Second Party, all the following Goods, Chattels and Personal Property:

One No. 1 Standard Portable Elevator with adjustable carriers for handling and piling bags, Serial No. B 13,322, manufactured by Brown Portable Elevator Company of Chicago.

To Have and to Hold said Goods, Chattels and Personal Property unto said Second Party, *his* heirs, executors, administrators and assigns, to and for *his* own proper use and behoof forever.

And said First Party *does* covenant with said Second Party, that said First Party *is* the true and lawful owner of said Goods, Chattels and Personal Property, and *has* in *him* full power, good right and lawful authority to sell and to dispose of said Goods, Chattels and Personal Property in manner as aforesaid; and *I* do for *myself, my* heirs, executors and administrators, covenant and agree to and with said Second Party, to Warrant and Defend said Goods, Chattels and Personal Property to said Second Party, *his* executors, administrators and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

In Witness Whereof, *I* hereunto have set *my* hand and

seal on this, the *twentieth* day of *April* in the year One Thousand, Nine Hundred and *Sixteen.*

GEORGE W. CLARK. [Seal.]

Signed, Sealed and Delivered
in the presence of

JOSEPHINE DEWEY.

State of *Illinois,*
Cook County } ss.

I, *Elsa G. Geewe,* Do Hereby Certify that *George W. Clark,* known by me to be the same person described in the foregoing instrument, personally appeared before me on the *twentieth* day of *April* A. D. 1916, and acknowledged to me that he executed the same.

ELSA G. GEEWE,
Notarial Seal.
Cook County,

ELSA G. GEEWE,
Notary Public
in and for Cook County, Illinois.

No. 2. *Memorandum of Sale.*

Charles A. Thatcher sells to J. Wilfred Weston one black horse named "Snowball," left front foot white, age 3 yrs., wt. abt. 1,200 lbs., now at seller's place of residence in Findlay, Ohio, for $100, of which $50 is to be pd. in 3 mos., $25 in 6 mos., and the balance in 9 mos. Sd. horse is to be delivered to buyer on payment of first installment, at which time buyer is to give mortgage on sd. horse to secure unpd. bal. Seller warrants sd. horse to be sound in all respects, and kind and gentle.

C. A. T.
J. W. W.

Dated: Aug. 12, 1916.

APPENDIX C.

ILLUSTRATIVE CASES.

[NOTE: The following illustrations are from cases actually decided by the courts. Each is, of necessity, very concisely stated, only enough being given to impress the particular point involved. The facts and the argument given are what the report of the case seems to indicate them to have been; and the law as laid down is by no means a quotation, but merely a condensed statement, as gathered from the opinion, of the rules applied to the facts.]

CASE No. 1.

RICHARDSON *v.* OLMSTEAD.

(1874) 74 Ill. 213.

Facts: Richardson, owning a warehouse, was engaged in buying and shipping grain. Olmstead delivered corn at the warehouse under an agreement that he was to be paid the market-price therefor on any given day he might elect to call for payment. The warehouse and its contents having been destroyed by fire, Olmstead brought an action to recover for corn sold.

Argument of Defeated Party (Richardson): The transaction was a bailment; the corn remained the property of Olmstead, and the loss, therefore, should fall on him.

Law Applied (Opinion delivered by Justice Craig of the Supreme Ct.): This was not a bailment as there was no contract that any corn was to be returned to Olmstead. The transaction was a sale, the price being the market-value of the grain on any day Olmstead might designate.

CASE No. 2.

LOVEJOY v. MICHELS.

(1891) 88 Mich. 15; 49 N. W. 901; 13 L. R. A. 770.

Facts: In September, Lovejoy having called on Michels to solicit an order for knives, Michels showed him some knives purchased from another firm and told the price paid therefor. Lovejoy said he would furnish better knives at the same price. No order was given then, nor was any promise made to order

any knives in the future; but in November Michels gave an order by letter for six knives, saying nothing, however, about the price. The knives were sent. Lovejoy was a member of an association of knife-makers in the United States, formed to keep up prices, and which fixed the prices of knives; but Michels did not have any knowledge of it. The bill for the knives was $72.86 per set, as fixed by the association, which Michels refused to pay; and suit was brought for the price.

Argument of Defeated Party (Lovejoy): The price charged, although fixed by the association, was what any buyer would have to pay if bought from any dealer.

Law Applied (Opinion delivered by the Supreme Ct.): The first conversation between the parties had nothing to do with the subsequent contract, so that there was no agreement as to the price to be paid.

In executed contracts of sale on credit where the price is not agreed upon at the time of the sale, the law implies an understanding to pay what the commodity is reasonably worth, which usually is the market-price.

The market-price of an article manufactured by a number of different persons is the price fixed by buyer and seller standing on an equal footing in an open market in the usual and ordinary course of lawful trade and fair and open competition.

The price fixed by a combination formed for controlling prices is unlawful although deemed reasonable by the combination, and has no force as a market-price. Combinations give the buyer no choice and prevent competition, so that there is, in effect, no market-value.

If there be no market-value of manufactured goods, the reasonable worth must necessarily be the cost of production, which would include the cost of labor and material, and a reasonable profit on the cost of production.

It is the province of the jury to determine from the testimony the reasonable worth of such goods. Witnesses cannot swear what goods are reasonably worth, but they may state the facts from which the jury may determine the reasonable worth.

CASE No. 3.

BOSTON ICE COMPANY *v.* POTTER.

(1877) 123 Mass. 29; 25 Am. Rep. 9.

Facts: Mr. Potter bought ice from the Boston Ice Company; but, becoming dissatisfied with the service, entered into

a contract with the Citizens' Ice Company to supply him. Later, the Citizens' Ice Company sold its business to the Boston Ice Company, who supplied Potter with ice for one year under the contract with the Citizens' Ice Company, but Potter supposed the ice was being furnished by the Citizens' Ice Company. Suit was brought to recover for the ice so supplied, and which had been used.

Argument of Defeated Party (Boston Ice Co.): There was an implied contract to pay for the ice supplied and used.

Law Applied (Opinion delivered by Judge Endicott of the Supreme Ct.): There was no express or implied contract between the Boston Ice Company and Potter. A person has a right to select with whom he will contract and cannot have another thrust upon him without his consent; nor can the sufficiency of his reasons be inquired into.

If Potter had known that ice was being delivered by the Boston Ice Company, a contract might have been implied.

CASE No. 4.

HUTHMACHER *v.* HARRIS'S *Administrator.*

(1861) 38 Pa. St. 491; 80 Am. Dec. 502.

Facts: At an auction conducted by an administrator, a "drill-machine" was offered for sale, and was purchased by Huthmacher for fifteen cents. The decedent was known to have owned considerable property, which the administrator had been unable to locate; and the auctioneer urged those present to buy with the expectation that treasure might be concealed in the articles offered for sale. Huthmacher took his purchase home; and as it was of little value, split it open, finding concealed therein twenty-four promissory notes for $3,106.89, cash, $100, gold coin, $446.02, silver coin, $41.34, two watches valued at $60, and a compass valued at 25 cents. Suit was brought by the administrator to recover the value of these articles.

Argument of Defeated Party (Huthmacher): Mutual ignorance of the value of an article sold does not invalidate the sale.

Law Applied (Opinion delivered by Justice Woodward of the Supreme Ct.): There was no sale of the valuables contained in the drill-machine, as they did not constitute any part of it. The machine alone was sold.

CASE No. 5.

DICKEY *and* LURVEY *v.* WALDO.

(1893) 97 Mich. 255; 56 N. W. 608; 23 L. R. A. 449.

Facts: Schultz, owning a farm near Saugatuck, entered into a written contract with Dickey and Lurvey in 1885, whereby they were to set out peach-trees on the farm, to care for and to cultivate the same for ten years, and to take as pay therefor one-half of the crop of peaches for any two years they might select during the term of ten years, such half of the crop to be picked by them. In 1887 Schultz sold his farm to Waldo who, at the time, had actual knowledge of the contract. Dickey and Lurvey selected the year 1891 as one of the years when they would take half of the crop, and gave Waldo written notice of their selection; but he refused to allow them to pick the peaches. Suit was brought for the value of one-half of the crop.

Argument of Defeated Party (Waldo): The crop which was to be given in payment of the trees was not in existence at the time the contract was made, and, therefore, could not be the subject of sale.

Law Applied (Opinion delivered by Justice Grant of the Supreme Ct.): When a person possesses a thing from which a certain product in the very nature of things may be expected, such product has a potential existence, and may be the subject of sale. In this case the sale was valid.

CASE No. 6.

HUNT *v.* WYMAN.

(1868) 100 Mass. 198.

Facts: Hunt had a horse for sale. Wyman, inquiring the price, was told that it was $250. Wyman said he would like to try the horse, and if he did not like it he would return it that night in as good condition as he got it. The horse was injured before Wyman tried it, but through no fault of his, and he did not return the horse. Hunt brought suit for the price of the horse.

Argument of Defeated Party (Hunt): Wyman bought the horse by failing to return it within the time agreed.

Law Applied (Opinion delivered by Just. Wells of the Supreme Ct.): Even if Wyman had agreed to buy the horse if he liked it, a sale would not have been effected until he had

determined whether he liked it or not. This was merely a bailment with an option to purchase, and not a sale with an option to return the horse if the buyer did not like it. Failure to return the horse within the time agreed, even though Hunt may have a remedy therefor, does not convert a bailment into a sale. It might, in some cases, be evidence of a determination to purchase, but not in this case, as the accident occurred before a trial was had.

CASE No. 7.

ROGERS *v.* WOODRUFF.

(1873) 23 Ohio St. 632; 13 Am. Rep. 276.

Facts: Woodruff sold Rogers 3,000 sacks of Liverpool salt "to arrive by the 15th of November." The salt did not arrive by November 15th; but by December 8th, 883 sacks had arrived which were delivered to the buyer. Action having been brought for the price, Rogers made a counter-claim for damages for not delivering the salt by November 15th.

Argument of Defeated Party (Rogers): The contract was not conditional on the salt arriving, but it was to be delivered on November 15th in any event.

Law Applied (Opinion delivered by Judge Stone of the Supreme Ct.): The words "to arrive" are words of condition and description, and there was no warranty that the salt would arrive. The salt contracted to be sold was that which was to arrive between the date of the contract and the 15th of November following. Its arrival depended on contingencies not within the control of either party. If the salt arrived, there was an obligation to deliver it; otherwise not. As the salt failed to arrive, there was none which the seller was bound to deliver or which the buyer was bound to accept. The buyer is not entitled to recover on his counter-claim.

CASE No. 8.

MACOMBER *v.* PARKER.

(1832) 30 Mass. (13 Pick.) 175.

Facts: Macomber and Evans were tenants in common of about 370,000 bricks in a brick-yard in Cambridge, the yard being in the possession of Macomber. They entered into an agreement whereby Macomber bought, at certain prices, the undivided half of the bricks belonging to Evans. The bricks

were to be counted, and Evans was to cart all of them to Boston; and their accounts were adjusted on that basis. After Evans had carted one load of bricks, the bricks remaining in the yard were attached by Parker, a creditor of Evans; and Macomber brought an action of replevin.

Argument of Defeated Party (Parker): The ownership of Evans in the bricks did not pass to Macomber, as the bricks remained to be counted and the quality ascertained before a final settlement was to be made.

The contract was unenforceable under the Statute of Frauds.

Even if the sale was complete between the parties, it was not binding on the creditors of the seller, as the seller was left in possession.

Law Applied (Opinion delivered by Just. Wilde of the Supreme Ct.): As there had been a delivery to the buyer, the fact that the bricks were yet to be counted to ascertain their exact value did not prevent a transfer of ownership to the buyer.

The bricks being in the buyer's yard, an actual delivery would have been an unmeaning ceremony and was unnecessary, a constructive delivery being sufficient.

The case would be taken out of the Statute of Frauds by the delivery and acceptance of the goods. In any event, the seller carted one load which would be a delivery of a part.

CASE No. 9.

MILLS *v.* HUNT.

(1838) 20 Wendell, 431; aff'g 17 Wend. 333.

Facts: Hunt bought five parcels at an auction. Though struck off to him separately, they were all included in one bill, and Hunt was to give one note for the aggregate price. Four parcels only were delivered, and action was brought for non-delivery of the fifth.

Argument of Defeated Party (Mills): The contract was unenforceable under the Statute of Frauds.

Law Applied (By the Supreme Ct., N. Y.): These sales were treated by the parties as embraced in one contract by being included in one bill and as one note was to be given for the whole amount. Delivery of part of the goods takes the contract out of the Statute of Frauds.

CASE No. 10.

HERSHEY LUMBER COMPANY *v.* ST. PAUL SASH, DOOR & LUMBER CO.

(1896) 66 Minn. 449; 69 N. W. 215.

Facts: The Hershey Co. tried to induce the St. Paul Co. to buy a quantity of lumber. The St. Paul Co. agreed to take one car-load, which was shipped. The next day the St. Paul Co. notified the Hershey Co. that it would take the whole lot. The buyer tendered $200, which was refused. Claim was made for damages for refusal to deliver the lumber under the oral contract.

Argument of Defeated Party (St. Paul Co.): There was delivery and acceptance of part of the lumber.

There was part payment of the price.

Law Applied (Opinion delivered by C. Just. Start of the Supreme Ct.): There were two separate transactions here, one relating to a car-load of lumber, concerning which there is no dispute. What was said and done in regard to the balance of the lumber is an entirely separate matter. The two cannot be treated as one sale so as to make delivery and acceptance of a car-load as being a part of the entire lot. There was no part delivery as to the balance of the lumber.

Tender is not a payment sufficient to take the case out of the Statute of Frauds. It must be accepted by the seller.

CASE No. 11.

REMICK *v.* SANDFORD.

(1876) 120 Mass. 309.

Facts: Remick, by an oral contract, sold twenty-four bags of wool to Sandford, three bags being shown which the seller said was a fair sample of the entire lot. A memorandum of sale was made and signed, stating the names of the parties, the subject-matter, the price and the terms of payment, but nothing more, and the wool was sent to the buyer's store. A few days later the buyer wrote refusing to accept the wool, as it was not like the sample. Action was brought for the price.

Argument of Defeated Party (Remick): The wool had been accepted by the buyer by being taken to his warehouse.

Law Applied (Opinion delivered by Judge Devens of the Supreme Ct.): In this sale by sample there was a warranty

that the bulk should correspond with the sample, and as this warranty was omitted from the memorandum, the memorandum was not a sufficient compliance with the Statute of Frauds.

Acceptance, to satisfy the Statute of Frauds, must be by some unequivocal act with intention to take possession of the goods as owner. A mere change of possession is insufficient. A receipt of goods for the purpose of examination only is not acceptance.

Memorandum

CASE No. 12. 39

CODDINGTON *v.* GODDARD.

(1860) 82 Mass. (16 Gray) 436.

Facts: A broker, having negotiated a sale, made an entry on his books on a page headed: "Boston, December, 1856," as follows: "9th. W. W. Goddard to T. B. Coddington & Co., 200,000 pounds Chili pig copper, 24¼ at 9 mos. from delivery, f. o. b. packet here for N. Y., seller paying freight, and buyer paying insurance to N. Y. To be 96 per cent. pure copper, and paper satisfactory to seller." The seller had a right to increase the amount by 100,000 pounds. Action was brought for not delivering the copper.

Argument of Defeated Party (Goddard): The entry was insufficient as a memorandum under the Statute of Frauds, as it does not show who is buyer and who is seller.

The memorandum does not mention the seller's option to add 100,000 pounds to his order.

The memorandum is not signed.

Law Applied (Opinion delivered by Ch. Just. Bigelow of the Supreme Ct.): As the broker acted as agent of both parties in completing the contract, he was empowered to make the bargain valid and binding; and, for this purpose, had authority to make the requisite memorandum to satisfy the Statute of Frauds.

The memorandum is perfectly intelligible and free from doubt, indicating a sale from Goddard to Coddington.

The validity of the memorandum is not affected because it did not include the stipulation made by the seller that he should have the right to add to the sale 100,000 pounds of copper the next day. This was a wholly separate and independent agreement which did not affect the sale actually made.

The broker had authority to sign the memorandum, and it is not requisite that the names of the parties should be at the

bottom, nor that the agent's name be signed. It is the substance and not the form which the law regards; and the great purpose of the Statute is answered if the names and terms are written and do not rest in oral proof.

Caveat Emptor **CASE No. 13.** 48

KOHL *v.* LINDLEY.

(1866) 39 Ill. 195; 89 Am. Dec. 294.

Facts: Kohl sold four ricks of hay to Lindley, at $4.50 per ton, for feeding sheep, the hay to be baled and weighed by the buyer. The seller did not make any representations, nor did he use any artifices. The buyer sent men who baled a small quantity of the hay, but no more, as the hay was alleged to be unsound. The hay was fit for feeding sheep though not fit for horses. The seller brought suit to recover the price of the hay.

Argument of Defeated Party (Lindley): The ownership never passed to the buyer because there was no delivery.

There was an implied warranty that the hay was merchantable.

There was an implied warranty that there were no latent defects.

Law Applied (Opinion delivered by Just. Breese of the Supreme Ct.): Between the parties delivery is not necessary to vest title in the purchaser, the ownership passing when the contract is made if nothing remains to be done by the seller. Here the baling and weighing were to be done by the buyer and he took possession for that purpose. This was delivery consistent with the nature of the article.

Where there is no fraud and the buyer has an opportunity to inspect the goods, the maxim is *caveat emptor.* Here it was quite easy for the purchaser to have satisfied himself as to the quality of the hay by pulling a few handfuls from the ricks, and it was his own folly that he did not do so. Damaged hay, as everyone knows, can be very readily detected by the color and smell. It is lawful for the seller to suffer the buyer to cheat himself if the seller does not actively assist.

It cannot be said that the hay was unmerchantable, as long as it was fit for the use for which it was bought.

The buyer must pay the price.

CASE No. 14.

GREEN *v.* SHATTUCK.

(1870) 104 Mass. 42.

Facts: Shattuck sold Green an undivided half of the furniture, fixtures and stock in trade of an eating-house. Some months after Green took possession, the property was claimed and taken by a third person; and suit was brought for such failure of title. Neither the seller nor the buyer was aware of the third person's claim until asserted.

Argument of Defeated Party (Shattuck): There was no implied warranty of title.

Law Applied (Opinion delivered by Judge Morton of the Supreme Ct.): When goods in the actual or constructive possession of the seller are sold, there is an implied warranty of title.

CASE No. 15.

SNOW *v. The* SCHOMACKER MANUFACTURING *Company.*

(1881) 69 Ala. 111; 44 Am. Rep. 509.

Facts: The Company sold pianos of their manufacture to Snow. On the first page of a circular issued by the seller, the following appeared in capital letters: "Every piano warranted for five years." The iron plate of three of nine pianos cracked. Suit having been brought for the price, a counter-claim was made for breach of the warranty.

Argument of Defeated Party (The Company): The warranty merely meant that every piano was warranted to be a piano.

Law Applied (Opinion delivered by Just. Stone of the Supreme Ct.): This warranty means that, with reasonable and proper treatment and handling, the piano will not break or give way in five years; that it has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale; that the parts are well fitted, securely fastened together, adapted, adjusted and harmonized to secure the proper effect.

If the express warranty does not mean this, the law implies a warranty, when a manufacturer contracts to sell an article, that it shall be reasonably fit for the purpose to which it is to be applied, and that the material and workmanship shall be good. If, by reason of defective material, workmanship, or

structure, it falls below this standard, there is a breach of this implied warranty.

In this case the buyer is entitled to damages for a breach of the warranty, the measure thereof being the difference in the value of the instrument as it was and where it was, and what it would have been if sound. This will include such expense as is reasonably necessary to repair the instruments or to put them in the condition they would have been in if there had not been any break—the expense of transportation to and from the factory if such shipment is necessary to obtain the repairs.

Warranty-Sample

CASE No. 16.

James DRUMMOND *& Sons v. E. H.* VAN INGEN *& Co.*

(1887) Law Repts. 12 App. Cases, 284; 56 Law J. Queen's Bench, 563; 57 L. Times, 1; 36 Weekly Reporter, 20.

Facts: Van Ingen ordered from Drummond, a cloth-manufacturer, some "worsted coatings" which were to be in "quality and weight" equal to certain samples previously furnished to the buyer. Owing to the mode of manufacture of the cloth, the seams of garments made therefrom gave way and braid became detached with no more than ordinary tension. The weft of the cloth was entirely concealed by the warp. Action was brought for the price.

Argument of Defeated Party (Drummond): The goods were made exactly as the samples, and there was no warranty that they were fit for any purpose. The defect in the sample could have been discovered by an examination.

Law Applied (Opinion by the British House of Lords): As the goods were designated as "coatings" it indicated that the goods were ordered for the purpose of being made up into coats. When goods are ordered from a manufacturer the buyer trusts to the skill of the manufacturer, and there is an implied warranty that the articles shall not, by reason of the mode of manufacture, be unfit for use in the manner in which goods of that character ordinarily would be used; otherwise it is unmerchantable. This was a sale by sample, and the goods corresponded with the sample; but the defects in the sample were latent and would not be disclosed by the use of ordinary diligence. The buyer is not required to apply unusual tests to the sample—to pull it to pieces, although it might have revealed the hidden defect. The goods were not manufactured properly, and the implied warranty that they should be merchantable was broken.

Warranty - Description

CASE No. 17. 37 . 43

UNADILLO SILO CO. *v.* HULL.

(1916) Vt. ; 96 Atl. 535.

Facts: The Company contracted to build a silo of "Canadian spruce" for Hull. The silo arrived at the station, and unloading began late Friday, Hull assisting. While the silo was being unloaded, Hull remarked that it was all right; but he was not familiar with lumber. On Sunday it was noticed that some of the staves of the silo were balsam instead of Canadian spruce; and on Monday morning the buyer sent a letter to the seller saying that the silo sent was not what had been ordered, and that acceptance was refused. After the contract-time for delivery had expired, the Company offered to replace any parts of the silo which were not satisfactory. Action was brought by the Company for the price.

Argument of Defeated Party (Company): The buyer had accepted the goods.

The silo had not been returned.

An offer was made to replace any parts which were not satisfactory.

Law Applied (Opinion delivered by Just. Watson of the Supreme Ct.): The words describing the kind of wood of which the silo would be constructed entered into the contract as a part of it and constituted a warranty that the silo would correspond to the description; a silo only partially "Canadian spruce" did not answer the description. The buyer was not under any obligation to accept it, and the seller must prove acceptance. Acceptance is assent to become the owner of the goods offered by the seller. The seller is bound to give the buyer a reasonable time and a fair opportunity for examining the goods. The remark by the buyer during the unloading, before opportunity for inspection had been offered, that the silo was all right, was merely an expression of opinion; it was not acceptance or a waiver of the right to inspect. While unloading the silo the buyer could not inspect the silo as a whole.

The silo sent not being one of a kind which the buyer agreed to take, and immediate notice having been given to the seller of its rejection, there was no duty to return it. Even if the right of inspection had been waived by delay, the buyer can resort to the breach of warranty.

The seller did not have any right to tender a second delivery after the time limited in the contract.

Warranty - Description

CASE No. 18.

TYE *v.* FYNMORE.

(1813) 3 Campbell, 462; 14 Rev. Rep. 809.

Facts: A sale of "fair, merchantable sassafras wood" was made to a druggist, and the day before the contract was entered into a specimen of the wood had been delivered to him which he kept until the following night. The buyer refused to pay because the sassafras delivered to him did not conform to the description; and action was brought for the price.

Argument of Defeated Party (Tye): The sassafras delivered was equal to the specimen, and the druggist was skilled in articles of this sort.

Law Applied (Opinion delivered by Lord Ellenborough of the English King's Bench): This was not a sale by sample, and it is not enough that the wood delivered corresponds in quality with the specimen. It must also conform to the description. It is immaterial that the buyer was skilled in medicinal woods, as he had an express undertaking as to quality, and was not bound to exercise his skill.

CASE No. 19.

the - Spec. - Sale

PHILLIPS *v.* MOOR.

(1880) 71 Me. 78.

Facts: Phillips owned some hay for which Moor was invited to make an offer. Moor wrote: "Will give $9.50 per ton, for all but three tons, and for that I will give $5.00. Phillips wrote in reply that he was in hopes that Moor would have paid $10.00; "but you can take the hay at your offer, and when you get it hauled in, if you can pay the $10.00 I would like to have you do it, if the hay proves good enough for the price." Moor did not make any reply but engaged a man to haul the hay. Two or three days later the hay burned in the seller's barn, and suit was brought by the seller.

Argument of Defeated Party (Moor): There was no contract for the purchase of the hay, and the ownership remained in Phillips, who should bear the loss.

Law Applied (Opinion delivered by Judge Barrows of the Supreme Ct.): Although the seller expressed a hope as to what he would like to have the buyer do, the buyer's offer was

unconditionally accepted, and the ownership passed as soon as the contract was completed by acceptance. The loss must be borne by the buyer.

appropriation

CASE No. 20.

CAYWOOD *and* CAYWOOD *v.* TIMMONS.

(1884) 31 Kans. 394; 2 Pac. 566.

Facts: Caywood & Co. made a contract with Timmons, a farmer, to take his crop of wheat except 75 or 100 bushels, at $1.05 per bushel, Timmons to thresh the wheat and to deliver it at the place of business of Caywood & Co. The buyers paid $50 in cash and delivered a pair of scales to be credited at $100 on the purchase price of the wheat. When the wheat was delivered it was found to have been damaged by rain, and the buyer refused to receive it, and brought an action to recover the $50 paid and the price of the scales.

Argument of Defeated Party (Timmons): The contract immediately transferred the ownership of the wheat to the buyer, and he assumed all risk of damage from deterioration.

Law Applied (Opinion delivered by Just. Valentine of the Supreme Ct.): The buyer did not purchase the whole of the crop. A portion of it was to remain the property of the seller, and separation could not be made until the wheat was threshed. Until separation all of the wheat remained the property of the seller.

Even if the parties had contracted in regard to specific wheat, it was not the intention that it should become the property of the buyer until it was threshed, weighed and delivered at some considerable time afterwards. It was not expected that the buyer should take any precautions to prevent injury to the wheat. The loss must fall on the seller.

Approp.

CASE No. 21.

ALDRIDGE *v.* JOHNSON.

(1857) 90 English Common Law (7 Ellis & Blackburn) 885; 26 L. J. Q. Bench, 296; 3 Jur. N. S. 913; 5 Wkly. Rep. 703; 119 Eng. Reprint, 1476; 110 Rev. Rep. 875.

Facts: Aldridge bought and partly paid for 100 quarters of barley from Knights who had a large heap of barley containing more than twice that quantity. Aldridge examined the

barley and sent 200 sacks to be filled by Knights. After filling 155 sacks Knights became bankrupt, and emptied the barley from the filled sacks back on the heap. Aldridge brought an action against the assignee in bankruptcy to recover the barley.

Argument of Defeated Party (Johnson): The barley was not Aldridge's property, and he cannot recover it.

Law Applied (Opinion delivered by the English Court of Queen's Bench): As the seller put the barley into the sacks, the ownership of each sackful passed to the buyer. He had inspected and approved the barley in bulk, and sent his sacks to be filled from that bulk. There was no doubt as to his assent to the appropriation of such bulk as should be placed in the sacks. But no portion of what remained in the bulk beyond the 155 sacks ever vested in the buyer, as it could not be told what part of it was to vest. Until appropriation and separation of a particular quantity, the ownership was not transferred. The buyer is entitled to recover for 155 sacks, but for no more.

Seller – Voidable Title

CASE No. 22.

WHITE *v.* GARDEN.

(1851) 10 Common Bench (70 Eng. Com. Law) 919; 20 L. J. Common Pleas, 166; 15 Jur. 630; 138 Eng. Reprint, 364; 84 Rev. Rep. 846.

Facts: Parker bought 120 tons of iron from Garden by means of a fictitious draft. Parker resold the iron to White. By Parker's order, Garden sent the iron to White, who paid Parker, White not knowing anything about the fraud practiced on Garden by Parker. Upon discovering the fraud Garden reclaimed the iron from White, and White brought an action against Garden to recover the value of the iron so taken.

Argument of Defeated Party (Garden): If goods are obtained by fraud the ownership does not pass and the seller has a right to reclaim them.

Law Applied (Opinion delivered by the Eng. Ct. of Com. Pleas): The general rule is that a man without ownership cannot transfer any; but there is a distinction between a sale of goods stolen by the seller and goods obtained by him by fraud. In the first case the former owner does not have any intention of parting with the ownership; in the other he has, and it passes. A sale of goods resulting from the fraud of the buyer is not void, except at the option of the seller, but he must act before the buyer has resold the goods to a third person. One

of two innocent persons must suffer, and it is more just that the burden should fall on the seller who parted with the goods upon the faith of a piece of paper which a little inquiry would have shown to be worthless, rather than upon the buyer who relied on the possession of the goods by the person from whom he bought. Although Parker could not have enforced the contract, White can.

CASE No. 23.

Seller in possession

SHAW *v.* LEVY.

(1827) 17 Serg. & Rawle, 99.

Facts: Lawrence sold a chariotee to Levy, the buyer leaving it in possession of the seller on storage. Three months later Lawrence sold the same chariotee to Shaw who took immediate possession and who was not aware of the former sale.

Argument of Defeated Party (Levy): There was a delivery of the property to the first buyer, and the ownership was in him so that it could not be transferred to a second buyer.

Law Applied (Opinion delivered by Just. Rogers of the Pa. Supreme Ct.): Possession of personal property is *prima facie* evidence of ownership. Lawrence had been the owner, and nothing had taken place which could lead Shaw to the knowledge that the property had been sold to Levy. Symbolical delivery is not sufficient, the law requiring delivery so far as practicable, which should have been an external, visible change of possession, and not a mere formal delivery on paper.

If Shaw had notice of the previous sale he would have been guilty of actual fraud, and Levy could have recovered possession of the property; but, under the circumstances, Levy does not have any right to it. This rule is based on public policy and on the sound maxim of morality and law, that where one of two innocent persons must suffer, he who is the cause of the loss must bear it. When a buyer leaves the property in the possession of the seller, although acting in good faith, the transaction is a legal fraud and the property remains at the risk of the buyer. Although there is no actual fraud and the delivery is sufficient as between the seller and the buyer, innocent third persons are not to suffer for the buyer's negligence.

CASE No. 24.

Title Conditional

KETCHUM *v.* WATSON.

(1860) 24 Ill. 592.

Facts: Watson sold Outlaw a horse on credit, on condition that the title was to remain in Watson until the price was

paid. Ketchum held a note against Outlaw, and afterwards was informed that the title to the horse was in Watson. Ketchum obtained judgment on his note against Outlaw and levied upon the horse, which was claimed by Watson.

Argument of Defeated Party (Watson): As Ketchum knew that the title to the horse was in Watson he could not levy upon it under an execution against Outlaw.

Law Applied (Opinion delivered by Just. Breese of the Supreme Ct.): If Ketchum did not know that the horse did not belong to Outlaw at the time credit was extended to Outlaw, subsequent notice could not affect his right to levy upon it.

CASE No. 25.

Bulk Sales

JOHNSON *Company v.* BELOOSKY.

(1914) 263 Ill. 363; 105 N. E. 287; 37 Ann. Cas. 1915C, 411.

Facts: Pilatt, engaged in the bakery business, sold his entire stock in trade, his store-fixtures, and the wagon and team used in connection with the business, to Beloosky without any notice to the seller's creditors. Subsequently the Johnson Company, a creditor of Pilatt, attached the goods and chattels sold.

Argument of Defeated Party (Beloosky): The sale was made in good faith and was valid.

Law Applied (Opinion delivered by Just. Vickers of the Supreme Ct.): Under the Statute, a sale of the bulk of the merchandise of the seller's business, otherwise than in the ordinary course of trade, is fraudulent and void as against the creditors of the seller unless certain specified notice is given to them.

CASE No. 26.

Stoppage

STEVENS *v.* WHEELER.

(1858) 27 Barb. 658.

Facts: Shoes were sold by Stevens on credit to Knower and shipped by steamer to Brooklyn. Knower gave Wheeler a written order on the steamship company for the goods, and Wheeler obtained them when the boat arrived at New York. A few days later Wheeler paid Knower for the goods, partly in an overdue note of Knower's and partly in cash. On the day the order was given to Wheeler, Knower made a general assignment for the benefit of creditors.

Argument of Defeated Party (Stevens): The seller's right to stop the goods continues until they reach the place of destination.

The seller's right to stop the goods continues until they come into the possession of the buyer.

Law Applied (Opinion delivered by Just. Ingraham of the New York Supreme Ct.): While the seller, discovering the insolvency of the buyer, has a right to stop the goods *in transitu*, the right is gone after they are once delivered to an agent of the buyer; and if this be the law as to the buyer's agent, with how much more force can it be applied to a purchaser from the buyer.

Delivery to an agent or purchaser of the buyer terminated the transit although the goods had not reached the place of destination.

CASE No. 27.

SHERMAN *v.* RUGEE, *sheriff.*

(1882) 55 Wis. 346; 13 N. W. 241.

Facts: Sherman sold and shipped to Scheider twenty-six rolls of leather, and sent a bill for same. The buyer was notified by the railway company of the arrival of the goods, but he did not obtain the leather or signify his acceptance of it. Later in the day the sheriff levied upon Scheider's stock of goods under an execution issued on a judgment against him, and Scheider gave the sheriff the bill for the leather. A few days later the sheriff took possession of the leather from the railroad company, under the execution, and placed the leather in Scheider's tannery with other goods previously levied upon. Then Sherman brought an action of replevin to recover the leather.

Argument of Defeated Party (Rugee): Scheider's delivery to the sheriff of the bill for the goods gave the sheriff authority over the leather; and his subsequent taking of the leather from the railway company was delivery to the buyer; and placing the leather in the store of the buyer was possession by the buyer, so that the right of stoppage was lost.

Law Applied (Opinion delivered by Just. Lyon of the Supreme Ct.): The mere fact that the leather had been seized by the sheriff does not destroy the seller's right of stoppage, as the possession of the sheriff was not as agent of the buyer. The buyer never had any control over the property at any time, so that the leather is regarded as still in transit.

CASE No. 28.

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JENKS *v.* FULMER, *sheriff.*

(1894) 160 Pa. St. 527; 28 Atl. 841.

Facts: Jenks sold Price three boxes of shoes on credit, and shipped them to him. Before their arrival Price failed, and the seller gave notice to the railroad company to claim and to return the goods. On arrival of the goods at the place of destination, a local expressman accustomed to carry goods to Price saw them; and, without the consent of the railroad company and without any special order from Price, took them to Price's store and unloaded them upon the sidewalk. Price declined to accept them, and directed the expressman to take them back to the freight-depot, which was done, where they were levied upon by the sheriff under a judgment against Price, and sold. Suit was brought against the sheriff for trespass, to recover the value of the goods.

Argument of Defeated Party (Fulmer): The delivery of the goods to the expressman and his unloading them terminated the transit, and the seller's stoppage *in transitu* no longer existed.

Law Applied (Opinion delivered by the Supreme Ct.): Taking the goods to Price's store and the return thence by his direction to the freight-depot did not constitute a delivery to him nor in any way interfere with the seller's right of stoppage *in transitu* which had been previously exercised.

CASE No. 29.

LANGSTAFF *v.* STIX.

(1886) 64 Miss. 171; 1 So. 97; 60 Am. Rep. 49.

Facts: Stix shipped goods to Reed & Reed by railroad. Reed & Reed applied to the railroad agent for the goods, paid the freight, receipted for the goods, remarking that they would leave the goods with the agent until their wagon came. After the Reeds were gone the agent opened his mail and found a letter from another agent instructing him not to deliver the goods, as they were claimed by the shipper. This letter had arrived before the Reeds appeared. Langstaff attached the goods, and Stix claimed them.

Argument of Defeated Party (Stix): Goods may be stopped at any time before they have come into the actual possession of the buyer.

Law Applied (Opinion delivered by Just. Arnold of the Supreme Ct.): The right of stoppage *in transitu* is favored in law and may be exercised at any time until the goods have come into the actual or constructive possession of the buyer; or, as otherwise expressed, the right may be exercised as long as the goods remain in the possession of the carrier as carrier. In this case the goods were not in possession of the carrier as carrier when they were attached. The liability of the carrier as carrier had been terminated, and the railroad company was the agent of the buyers—not for transportation but for custody, so that the right of stoppage was gone.

CASE No. 30.

Damages

SCHWAB SAFE & LOCK CO. *v.* SNOW.

(1915) Utah, ; 152 Pac. 171.

(1914) 44 Utah, 341; 140 Pac. 761.

Facts: The Schwab Company were manufacturers of safes, and Snow was engaged in selling them. Snow ordered six safes which the Schwab Co. knew he had resold and the price which he was to obtain. They could not deliver the safes promptly, and were notified by Snow not to ship them, as his customers had refused to wait any longer. Action being brought for a balance due from Snow, he made a counter-claim for damages for failure to deliver the safes.

Argument of Defeated Party (The Company): The buyer should have obtained other safes in the market, and his damages were limited to the difference between the value of such safes and the contract-price. Loss of future profits is too speculative and remote to be allowed as damages.

Law Applied (Opinion delivered by Just. Frick of the Supreme Ct.): The usual rule is that, upon breach of contract by the seller, the buyer must obtain the article in the market if he can do so, and his measure of damages is the difference between the price he agreed to pay and the market-value; but when the article cannot be obtained, and the seller knew of the sub-sale and the price to be obtained by the buyer, the buyer can recover the profits of such resale as damages. In this case the buyer could not obtain other safes in the market, and he is entitled to his prospective profits on the resales.

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NEGOTIABLE INSTRUMENTS

NEGOTIABLE INSTRUMENTS.

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CHAPTER I.

NATURE, KINDS AND PARTIES.

1. Title to Property—Money.
2. Negotiable Instruments—Kinds.
3. Distinctions—Negotiable Instruments and Money.
4. Payment by Negotiable Instrument.
5. Distinctions—Negotiability and Assignability.
6. Uniform Law.
7. Origin of Negotiability.
8. Continuance of Negotiability.
9. Notes, Bills, Checks—Definitions, Forms.
10. Note—Promise in.
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16. Parties—Primary, Secondary, Accommodation.
17. Parties—Immediate and Remote.
18. Ambiguous Instruments.
19. Drawer—Admissions.

TITLE TO PROPERTY—MONEY.

1. **Generally, a person cannot transfer any better title to property than he possesses; but there are some exceptions to this rule.**

Money, being the common medium of exchange in a civilized country, is one of the exceptions.

As has been seen in the discussion of "Assignments" and "Sales," the general rule is that a transferror cannot give any better title than he has. There are some exceptions to this rule; but to constitute an exception there must

be good reason therefor, based either on the negligence of the owner or on public policy, and the exceptions are restricted to cases where more hardship would result from the enforcement of the general rule than to allow an exception.

Money issued by the government, whether made of metal or consisting of what is known as "paper-money," is one of the few exceptions. Money, or currency, is the common medium of exchange in a civilized country. The interests of commerce require the credit of money passing by delivery to be unquestionable so that its ready circulation may be unobstructed; otherwise continual suspicion and doubt would exist whether it could be taken with safety, and trade consequently would suffer therefrom.

To illustrate this general rule and this exception, let us suppose *A,* having a horse and also a ten-dollar bill, loses each of them. *B,* finding them, sells the horse to *X* who supposes *B* owns it, and pays full value for it. *B,* with the ten-dollar bill, buys something from *Y* who does not know the circumstances under which *B* came into possession of the money. *A* could reclaim the horse from *X* without reimbursing him; but *A* could not reclaim the money from *Y*.

X's remedy in regard to the horse would be against *B* on his implied warranty of title (see, *ante,* "Sales," §19); and *A's* remedy in regard to the money would be against *B* on a *quasi* contract. (See, *ante,* "Contracts," §10.) *B* would also be liable in tort for the conversion of the property, and, possibly, in a criminal action. (See, *ante,* "Elementary Law," §10.)

However to enable a transferee of money to retain it as against a former owner, two things must concur. The transferee must have taken it for value and, at the time he parted with such value, must not have notice of the defective title of his transferror. (See, *post,* §69.) One of these alone

is insufficient. Thus, in the illustration above, if *B*, before making his purchase from *Y*, had remarked that he had found the money, *Y*, although parting with full value in exchange therefor, could not have retained it as against *A*, as *Y* took with notice of *B*'s lack of title and assumed the risk of its being claimed by another. If *B* had made a present of the money to *Z*, the latter could not retain it as against *A*, although ignorant of *B*'s lack of title, as *Z*, not having parted with value, would not be in any worse position, after giving up the money, than he occupied previously, and it would be inequitable for *Z* to retain it.

The fact alone that circumstances might arouse suspicion whether a person in possession of money had a right to transfer it, would not prevent a transferee from acquiring a good title to it. (See Appendix B, Case No. 1.) A transferee must act in bad faith in order to make his title defective, that is, the transferee must have actual knowledge of the facts, or the circumstances must be extremely suspicious and the transferee have ready means for informing himself from which he purposely abstains, so that he may be regarded as having actual knowledge. (See, *post*, §71.)

After lost or stolen money reaches the hands of a person for value without notice, he can transfer a perfectly good title to one having knowledge of the former facts and who does not part with value. In such a case the transferee acquires his transferror's title along with the money. Thus, in the illustration above, *Y* could make *Z* a present of the ten-dollar bill, and *Z* could hold it as against *A*, although *Z* knew, when the gift was made to him, that *A* formerly had lost the bill. If, however, by subsequent transfer, the bill should come into *B's* hands again, *A* could claim it from him. *B* never can acquire a good title to the bill by merely passing the money through the hands of a number of innocent third persons. (See, *post*, §69.)

So far as money is concerned, these rules have little practical application and are seldom invoked, owing to the difficulty

of locating and identifying a particular piece of money, especially coin; but the principle involved is important, and has application to negotiable instruments.

NEGOTIABLE INSTRUMENTS—KINDS.

2. A negotiable instrument, being in the nature of private money, is another exception to the general rule that a person cannot transfer any greater rights than he has.

The most common negotiable instruments are promissory notes, bills of exchange (drafts) and checks.

A negotiable instrument is one of the most common exceptions to the rule that a person cannot transfer any better title than he has, it being possible for the holder of a negotiable instrument which, for some reason, is valueless in his hands, to transfer it to someone who can enforce it, a negotiable instrument being in the nature of money issued by private persons.

In many cases when the student is in doubt as to the law applying to negotiable instruments, it can be solved by recalling the rule that would apply if money had been used in the transaction instead of a negotiable instrument.

There are various reasons why certain instruments have become negotiable and assumed the nature of money. In remote antiquity all commercial transactions must have been by way of exchange or barter (see, *ante*, "Sales," §5); but this method being very inconvenient in many respects, some commodity of common use, as cattle, or some arbitrary representative of value, as shells, became the common medium of exchange. This, likewise, was unsatisfactory, so that, ultimately, rare and useful metals, being valuable and more easily carried, became the medium of exchange, eventually being shaped for more convenient handling, and stamped to indicate the value, to show genuineness and to prevent wear and tampering. However, there was not, and is not now,

enough gold and silver to meet the requirements of a circulating medium; so, naturally, a resort was had to obligations to pay which represented fixed values. Then, too, a very large sum of metallic currency is not easily carried; and, if carried, is subject to wear, to loss, and to theft. A piece of paper representing value would be much more safe.

The most common three kinds of negotiable instruments in use are promissory notes, bills of exchange, and checks; and it can conservatively be said that at least ninety per cent. of all commercial transactions are conducted by means of these instruments.

The term "commercial paper" is frequently used as synonymous with "negotiable instruments." Possibly the former term is a little broader than the latter, sometimes including instruments not fully negotiable; on the other hand, some instruments, technically negotiable as to form, might be so inartificially drawn as practically to restrict their transfer as the equivalent or representative of money in the commerce of the world.

There are some other kinds of negotiable instruments, such as coupon-bonds issued by private corporations, by municipalities, and by government, payable to bearer; but they are usually purchased for investment and not so frequently transferred as notes, bills of exchange and checks, so that space cannot be taken for the rules peculiar to them. (See, *post,* Appendix A, Negotiable Instruments Law, §332.) Generally the ordinary rules of negotiability apply.

Some other instruments are said to be "*quasi*-negotiable," that is, have some, but not all, of the characteristics of negotiable instruments, the most common of these instruments being bills of lading, warehouse receipts (see, *ante,* "Sales," §44), and corporate stock. The former two have received some attention in the subject of "Sales"; and the latter will be referred to under "Corporations." (See, *post,* Volume V.) None of them properly belongs to this subject.

DISTINCTIONS—NEGOTIABLE INSTRUMENTS AND MONEY.

3. The distinctions between money and negotiable instruments are:

Money is issued by the Government; negotiable instruments are issued by private persons.

Money is intended to have unlimited circulation; negotiable instruments are intended to circulate for a limited time only.

Money is not made payable to a particular person; negotiable instruments generally, though not necessarily, designate a person to whom payment is to be made.

A tender made with money is usually sufficient; the offer of a negotiable instrument usually is not a legal tender.

Payment by money is absolute; payment by negotiable instrument is usually, though not always, conditional.

Money, or currency, although frequently in the form of a promise to pay, is technically not designated as a negotiable instrument in the sense here used. It is issued by the Government, which, being a sovereign power (see, *ante*, "Elementary Law," §4), is not subject to the rules applying to individuals, and its promises are voidable. (See, *ante*, "Contracts," §23.)

Money is intended to circulate indefinitely; instruments issued by private individuals may be in circulation for some length of time, but ultimately they lose their negotiability, and most negotiable instruments circulate for a very brief period. (See, *post*, §74.) Money is made payable to

"bearer"; negotiable instruments usually though not necessarily designate a person to whom payment is to be made. (See, *post,* §31.)

Paper-money and negotiable instruments are alike in this, that each is based on credit, the former being the credit of the Government, the latter, the credit of individuals.

Money alone is legal tender. (See, *ante,* "Contracts," §80.) A negotiable instrument, however valuable it may be, is not legal tender, unless the creditor objects to it on some other ground than the form of the tender.

Payment in money, although it may be of a kind which is not legal tender, is absolute, that is, it completely discharges the indebtedness for which it is given; but giving a negotiable instrument for an indebtedness is generally treated as conditional payment, that is, the original indebtedness is not discharged unless the instrument itself is paid in turn.

Thus, if the buyer of goods should give his check in payment, and the creditor promptly presents the check to the bank for payment, but payment is refused by the bank, and the creditor promptly notifies the debtor of this fact, the seller can ignore the check and bring suit for the price of the goods sold; but if money had been given in payment, the claim would have been discharged although, for some reason, the government might repudiate its obligation.

The general rules for determining whether payment with a negotiable instrument is regarded as absolute or as conditional are set forth in the following section.

PAYMENT BY NEGOTIABLE INSTRUMENT.

4. In the absence of any express agreement on the point payment with a negotiable instrument is generally presumed to be conditional—

If the debtor is an apparent party to it; or—
If the indebtedness is antecedent.

Payment by a negotiable instrument is generally presumed to be absolute if the debtor is not an apparent party to it and the indebtedness is contemporaneous.

Whether payment by a negotiable instrument is absolute or is conditional is governed by the intention of the parties. (See, *ante,* "Contracts," §78.) If they have made an express agreement on this point there is no question as to the intention; but, as is generally the case, such an express understanding has not been reached, and their intention must be implied.

If the name of the debtor appear on an instrument given in payment, the general rule is that it is accepted by the creditor as conditional payment only. (See Appendix B, Case No. 2.)

If payment be made with a negotiable instrument upon which the name of the debtor does not appear, the payment will be presumed to be conditional if the indebtedness was pre-existing, that is, arose out of some prior transaction; but such payment will be presumed to be absolute if made at the very time the obligation to pay was created.

Thus if *A,* indebted to *B* for goods bought on credit on some former occasion, should give *B* a note signed by *X,* payable to "bearer," on which the name of *A* did not appear, the payment would be presumed to be conditional; but if *A* should buy goods from *B,* and, at the time of the sale, *B* should agree to receive such a note of *X* in payment, the *prima facie* presumption is that the payment was absolute, that is, the right of *B* to recover anything would be through the instrument and not by an action for the price of the goods sold.

A creditor, having a valid existing claim, might be presumed to intend that it should be discharged only by the ultimate receipt of money; but where an agreement is made to accept an existing negotiable instrument of a third person in

a transaction just consummated and into which the creditor was not obliged to enter but did so with full knowledge that such an instrument was to be transferred in payment, it might naturally be supposed that each party regarded the transaction as completely closed. Of course, fraud must be absent in these cases.

Where a negotiable instrument, due at a later date, is taken as conditional payment, it at least suspends the right of action on the original claim until it appears that the instrument has not been paid as expected.

It will be observed that good business requires a creditor, taking a negotiable instrument for a pre-existing indebtedness, to stipulate that it is taken conditionally, if such be his intention.

DISTINCTIONS—NEGOTIABILITY AND ASSIGNABILITY.

5. Assignment, in its broadest sense, includes negotiation, and also includes assignment in its narrower meanings.

Assignment in a narrower sense means the transfer of a money-claim in any other manner than by negotiation.

Negotiation is the transfer of a negotiable instrument in such form and manner as to give the transferee all the rights and privileges arising from negotiability.

The most important distinctions between assignment in the narrow sense and negotiation are:

An assignee takes such title only as the assignor had; negotiation may give a good title to the transferee although the transferror did not have a good title.

Assignment requires notice to be given to the debtor in order to give full protection to the assignee; negotiation does not require any notice to the debtor.

In Volume I of this series, beginning with Section 70, the rules governing assignments are set forth. "Assignment" is one of the legal terms having more than one meaning. Its broadest meaning includes every kind of a transfer of any kind of property, even a conveyance of real property; but when "assignment" is contrasted with "negotiation," and "assignability" with "negotiability," "assignment" takes a restricted meaning, being used to designate a transfer of a money-claim in any other method than by negotiation. Negotiation is the designation given to the transfer of a negotiable instrument in the manner required by law to give the transferee all the rights and privileges which a negotiable instrument can bestow. These requisites will be noticed, *post,* in Chapter IV. If a negotiable instrument be transferred in a manner which does not conform to the requirements of negotiation, the instrument will be assigned merely, not negotiated; that is, the transferee will be in the position of any assignee without the rights and privileges which pertain to negotiability, although the instrument itself be a negotiable one. (See, *post,* §65.) In this section the distinctions between assignment in its narrow sense and negotiation will be pointed out, not only that some of the advantages of negotiability over assignability may be perceived, but that the meaning of "negotiability" may be better understood.

The most important distinction between assignability and negotiability is that an assignee takes no better title than his assignor had. If an assignor have a good title, the assignee will obtain it; but if an assignor have a defective title, the assignee takes the claim subject to the defect, unless the debtor agrees to pay or is otherwise estopped. If the assignor does not have any claim at all, the assignee acquires nothing by the form of an assignment. As it sometimes is expressed, an assignee stands in the shoes of his

assignor. An assignee is in no better position than his assignor; on the other hand, he is in no worse, unless there is an agreement to the contrary.

If there have been several successive assignments of the same claim, the title of the last is as weak as that of the weakest of any of the assignors, although the first assignor had a valid claim. Thus, an assignment of a valid claim is made successively to *A, B, C,* and *D;* but, while *B* was holding the claim, the debtor performed services for him so that the claim against *B* for such services was equal to the amount of the claim against the debtor. This counterclaim of the debtor could be successfully set up against *C* or *D,* as *B,* not having an enforceable claim against the debtor after the performance of the services, had nothing to transfer to *C,* and, hence, *C* had nothing to transfer to *D,* although the debtor had no defense against *A* originally.

If, however, a negotiable claim be negotiated, it is possible for the transferror to give his transferee a better title than the transferror had. In some cases, even an agreement which was void in the hands of the transferror will become a valid contract in the hands of a transferee. It must not be supposed, however, that it is the form alone of the transfer which gives this advantage; to give the transferee a better title than the transferror, two things must concur, first, the contract transferred must originally have been a negotiable one, and, second, the transfer must be by negotiation. The requisites of a negotiable contract will be considered, *post,* in §21; and of negotiation in Chapter IV.

The next important distinction between assignment in the narrow sense and negotiation is that assignment requires notice to the debtor in order fully to protect the assignee (see, *ante,* "Contracts," §72); for if a debtor, without notice of an assignment of the demand against him, were to deal with his former creditor in any way, the debtor would be protected as against the assignee of whose existence the

debtor was ignorant. After a debtor has knowledge of an assignment of the claim against him, he is obliged to respect such rights as the assignee has. In the case of a negotiable instrument, however, the debtor is not entitled to notice of a transfer thereof; he deals with his former creditor at his peril and, in some cases, might be obliged to pay the claim a second time, although he acted in good faith. (See, *post,* §81. See, also, Appendix B, Case No. 21.) In other words, a debtor is justified in the presumption that a claim against him, which is not negotiable, has not been assigned, and, in the absence of knowledge to the contrary, is safe in acting on that presumption; but there is no presumption that a negotiable instrument has not been transferred by the party to whom it was given. In such a case, the debtor, in his subsequent dealings in regard to the instrument, is required to ascertain whether the person with whom he deals has possession of the instrument.

There are a few other distinctions between assignability and negotiability which will be presented here, though of minor importance from a purely business standpoint.

The holder of a negotiable claim by negotiation can bring a suit thereon in his own name (see, *post* Appendix A, Negotiable Instruments Law, §90); while, under the common law, suit on an assigned claim must be brought in the name of the original creditor. This common law rule, however, has been changed in many States by statute; and in some of them the holder of a claim not only may bring suit in his own name but the statute requires him to do so.

When suit is brought on an assignable claim, the assignee is required to set forth and to prove its validity—that it is based on a consideration, and that it is unpaid, just as the assignor would have been required to prove it if he had retained it and brought suit thereon; in addition an assignee must show how he personally became entitled to enforce the claim. That is, there is a presumption that the original creditor retains the claim

until the contrary is shown by evidence of the transfer. On the other hand, when suit is brought on a negotiable instrument properly negotiated, there is a *prima facie* presumption that it is valid and that the party bringing suit is entitled to recover on it (see, *post,* Appendix A, Negotiable Instruments Law, §98), the burden being on the debtor to show its invalidity or that the holder is not entitled to the instrument, or that there is some other sufficient legal reason why the debtor is not liable to the party bringing suit. In other words, an assignee brings suit on the original contract; the transferee of a negotiable instrument sues on the contract contained in the instrument itself which, in one sense, was made with him and is independent of the transaction which originally led to its being entered into. Thus, if *A* had sold a horse to *X* on credit and then assigned his claim for the price to *B, B* would sue *X* for the price of the horse owing *A;* but if *X* had given his negotiable promissory note for the price to *A* which *A* negotiated to *B, B* would sue *X* on the note.

Assignment may be made of a claim not evidenced in writing; negotiation, however, requires a written instrument as the subject thereof. Assignment of a claim evidenced in writing may be oral, unless some statute requires a written assignment, though an oral assignment is not good business in any case. If an assignment be in writing, such writing may be very informal. Negotiation in some cases may occur without a writing, but in many instances a writing is required, negotiation being a matter of some formality. As a general rule, where a claim has been the subject of several written assignments, each assignor is liable only to his immediate assignee; while the transferror of a negotiable instrument, whose name appears thereon as such, may be liable to each subsequent holder. (See, *post,* §56; also Appendix A, Negotiable Instruments Law, §116.)

As will be noticed, *post,* in Chapter VI, the transferee of a negotiable instrument is generally required to act promptly in presenting it to the debtor for payment when due (see, *post,* Appendix A, Negotiable Instruments Law, §130), and in notifying former holders of the non-payment (see, *post,* Appendix A, Negotiable Instruments Law, §160), otherwise he will lose

his rights against former holders; but if the holder has acted promptly and the instrument remains unpaid, he may have the right to collect from former holders unless there is an express agreement to the contrary. However, if a claim is assigned merely, and not negotiated, the holder is not required to act so promptly in attempting to collect it from the debtor, and does not lose any rights against his assignor unless the delay becomes unreasonable.

After the assignment of a valid claim, even though not assented to by the debtor, the debtor generally can be compelled to pay the assignee; but if the claim against the debtor be transferred by drawing a negotiable instrument, the holder of such an instrument does not acquire any rights against the debtor on the instrument until he voluntarily becomes a party to it. (See, *post,* Appendix A, Negotiable Instruments Law, §§ 211, 325.)

The distinctions between negotiability and assignability may be based on the fact that in an assignment the contract on which it is based was made by the debtor with his creditor alone, and not with any other person; while a debtor in a negotiable instrument makes a contract, not only with his original creditor, but with each subsequent holder of the instrument, which is entirely distinct from the original contract though based on it.

The distinctions between assignability and negotiability may be better understood by an illustration. Let us suppose that *I,* having some money to invest, is acquainted with *M,* a merchant. *I* is told by *M* that the latter has claims against several customers for goods sold, which he will transfer to *I* at a liberal discount, and that *M* will guaranty the payment of each. *I,* knowing the financial standing of the customers, accepts *M*'s proposition. *M* then assigns to *I* some accounts, each due on the first of the following month, against *T, U, V, W, X, Y,* and *Z,* all of which are taken in good faith by *I* who immediately pays *M.* Just before the assignments are complete *Z* comes into the store, and *I* asks him if the ac-

count against him is correct, as an assignment of such account is about to be made. Now *Z* has performed some services for *M*, so that he has a counterclaim against *M* which he had intended to set off against *M's* account against him, but he hastily concludes not to say anything about this matter to *I*, but to make a separate claim against *M* later; so *Z* tells *I* that the account is valid, and *Z* sees the assignment of his account made to *I*. There being some doubts about the amount of the claim against *X*, *I* then and there telephones *X* before taking an assignment of it, and *X* admits to *I* that the amount is correct; but *I* never tells *X* of the assignment.

M also has some negotiable promissory notes due on the first of the following month, signed by some of his customers, which, by writing his name on the back, he transfers to *I* at the same time as the assignments of the other claims are made. These notes are signed by *A*, *B*, *C*, and *D*, respectively, and are taken in good faith by *I* who at the same time pays *M* for them.

In addition *M* has a claim against *O* for $200, being money previously lent to him, and *M* gives *I* an order on *O* for the latter to pay *I* $100 on the first of the following month.

Just after leaving *M*'s store, *I* meets *Y* on the street, and tells him of the assignment of his account; but as to the claims other than those against *Y* and *Z*, *I* is occupied with other matters and does not give any notice. To do so would take some of his time and cause him some trouble.

After all of these transfers and before the first of the following month, *M* goes into bankruptcy so that all claims against him become practically worthless.

On the first of the following month *I* presents his accounts, the notes and the order, to the respective parties for payment; but, each refusing to pay, *I* institutes a suit against

each of them. Suits against *T, U, V, W, X, Y,* and *Z* are conducted in the name of *M;* but those against *A, B, C, D,* and *O* are conducted in *I*'s own name.

A and *T* make similar defenses—that they never owed *M* anything. *T* says that *M* was mistaken in thinking *T* owed him. *A* admits giving the note, but says it was for goods to be sent him by *M,* but which never were sent. *I* must prove *T*'s liability if he can, but he cannot do so, as the fact was *M*'s supposed claim against *T* was for goods erroneously charged against him. Although *I* took the assignment of this account for value and in good faith he has no better claim against *T* than *M* had, and the defense of want of consideration can be made against *I* just as it could have been made if *M* had retained the account; hence *I* loses the money paid to *M* for this claim. It is true that *I* has a right of action against *M* on the latter's implied warranty (see, *ante,* "Contracts," §73), but *M*'s bankruptcy makes this right practically worthless. As to *A*'s promissory note, it is different. Although *M* could not have collected the note from *A,* as the defense of failure of consideration could have been successfully made against him, *M* could give *I* a better title to the note than *M* had as long as *I* acquired the note for value before maturity and without notice of *A*'s defense, as the note was a negotiable instrument. *I* likewise is presumed to have a good title and need not show how he acquired the note, unless *A* shows facts indicating that *I*'s title is defective. *A* will have to pay for goods he never received, leaving him to such remedy as he may have against *M*. The suit on the assignment was based on the original contract under which the right to demand payment was supposed to have arisen—a sale of goods. The suit on the negotiable instrument was based on the instrument itself and not on the original transaction which led to its execution.

B and *U* set up similar defenses. Each asserts that *M* was tricky—intentionally sent goods absolutely worthless. In this case *I* cannot recover anything from *U*, as fraud would have been a good defense against *M*, and *I* is in no better position as assignee; but *I* can recover against *B*, as *B*'s liability arose under a negotiable instrument, and *I* is not concerned in the transaction between *B* and *M*.

C, *V*, *X* and *Y* make similar defenses to the suits against them. Each says that he paid *M* after *I* acquired the claims and before they were due. This defense of payment is valid as to *V*, as it would have been sufficient against *M* if *M* had retained the account, as *V* did not know anything about the assignment, and *I* as assignee has no better right. *I* was negligent in not notifying *V*. *Y*, however, had been notified by *I* of the assignment, so that *Y*'s subsequent payment to *M* after knowledge of *I*'s rights was at *Y*'s peril, and *Y* can be compelled to pay *I* over again, leaving *Y* to recover his payment from *M* if he can. *X*, likewise, cannot be compelled to pay *I*, either on the ground of estoppel or because of notice. He is not estopped, because the claim against him was valid at the time of the assignment, as he admitted; it was subsequent payment that constitutes his defense. *X* is not in the same position as *Z*, because *Z* had actual notice of the assignment; *X* did not have any such notice. When paying *M*, *X* asked if he still had the claim and *M* falsely said that he had. Merely because *I* was thinking of taking an assignment is not notice that he had taken it. The debtor is justified in supposing a claim is not assigned until he has actual notice. It would have been good business for *X*, before making payment to *M*, to have questioned *I* if *X* knew that *I* was the person who telephoned him. It certainly would have saved trouble and expense; but *I* did not take sufficient steps to protect his interests as assignee. *C* claims lack of liability because he did not have notice of the transfer of his

note, and he paid *M* in good faith, supposing *M* still held the note, who accepted payment without telling of the negotiation; but the note was a negotiable instrument, and *C* was not entitled to notice of its transfer. He should have demanded to see the note before he paid it to *M*. The note being negotiable, *I* can compel *C* to pay it again.

D, *W*, and *Z* make similar defenses. Each says that he performed services for *M*, and that the amount owing by *M* for such services should be applied on the claims of *M* against them. So far as *W* is concerned, his defense is valid, because the account against him was assigned merely, and any defense he would have against *M* would be valid against *I*, the assignee. If *I* had notified *W* of the assignment, *W* could not set up any counterclaim arising after such notice, though notice could not affect any counterclaim which *W* held at the time of the notice, unless he concealed his defense from *I*. *I*, however, can recover from *D*. Why? Because *D* was liable on a negotiable instrument, and it cannot be affected by any defense of which *I* did not have knowledge at the time he acquired the note for value. *Z* could make the same defense as *W* were it not for the fact that *Z* estopped himself from setting up his defense when asked by *I* as to its validity at the time the latter acquired the claim. If *Z* had spoken to *I* at that time about his counterclaim, or if *Z* never had been asked, his defense would have been valid; but having allowed *I* to part with money in reliance on his statement, *Z* will not be allowed to speak afterwards when to do so would cause injury to an innocent person. *Z* will have to pay *I*, and then recover from *M* on his counterclaim if he can.

I's rights in the notes he acquired are the same as he would have had to money which the makers of the notes might have left temporarily with *M* and which *M* inadvertently or wrongfully paid to *I* who took it for value and in

good faith; but assignment does not give any such rights in the claims assigned.

O, in most jurisdictions, cannot be compelled to pay *I* if he does not wish to. Although the order on him by *M* was a negotiable instrument, *O* is not liable on it as he is not a party to it. He has the option of paying it or not. He may prefer to deal with *M* only, his original creditor. This was not an assignment to *I* of a particular claim by *M* against *O*, but merely an order to pay a sum of money generally. If *M*'s claim against *O* had been assigned to *I* and it was valid, *I*, in most jurisdictions, could have compelled payment, although *O* might prefer to pay *M*; but a person who never was a party to a negotiable instrument in any way cannot be held liable on the instrument as a contract.

There are few, if any, legal subjects more difficult to be presented, especially to a beginner, than that of negotiable instruments, not only because of the extreme technicality of the subject, but because each branch of it should be presented before every other branch, in order that the latter can be fully understood; that is, there is no logical method of presenting the different branches, so that whatever branch is presented, constant reference is required to other branches not yet discussed, and terms not yet fully explained must be used. The subject must be taken as a whole; its parts cannot very well be taken up separately and discussed satisfactorily with a person not having any familiarity with the subject at all. Thus, indorsements cannot be presented without reference to acceptance and to presentment; acceptance cannot be discussed without reference to indorsement and to presentment; and presentment cannot be discussed without reference to acceptance and to indorsement. The only way the student can overcome this difficulty is to go over the entire subject at least twice. While this is advisable in any study, it is especially desirable in this subject, as the second reading will make many points clearer in the light of the first reading. The student must not be discouraged if he does not grasp all the rules at once; but, as the subject is a very important one in business matters, he should persevere until the leading principles are understood.

UNIFORM LAW.

6. The modern law in regard to negotiable instruments is embodied in an act known as The Negotiable Instruments Law, adopted by most of the States.

Prior to the year 1897, the law in each State in regard to negotiable instruments depended entirely on the statutes and the decisions of the supreme court of such State which varied considerably, creating much confusion, as a person trading in more than one State was required to inform himself as to the law in each of them so as to protect his rights. In 1896 an effort was made to induce the legislatures of all the States to enact uniform laws covering the various commercial subjects. The first subject in regard to which such an effort was made was negotiable instruments. An act, known as the Negotiable Instruments Law (see, *post,* Appendix A, Negotiable Instruments Law, §1), was drawn which, with slight changes in some States, has been adopted by nearly all of the States, so its provisions may now be said to constitute the law on that subject in this country, and the rules laid down in this volume are based on that act.

New York was the first State to adopt the act, and the statute of that State is set forth in Appendix A at the end of this subject, to which reference will be made in the text from time to time. The student should consult the statute of his own State to ascertain if there are any deviations from the New York statute.

The Negotiable Instruments Law deals with leading principles only and does not attempt to pass upon every point, thus leaving much to the decisions of the courts, which, unfortunately, are not uniform throughout the country.

ORIGIN OF NEGOTIABILITY.

7. The law in regard to negotiability was derived from the Law Merchant.

Originally all claims were not only non-negotiable but non-assignable. (See, *ante,* "Contracts," §72.) Even after the law began to allow the assignment of claims, negotiability was not at first recognized by the courts. Merchants, however, in their dealings with each other in regard to instruments of certain form calling for the payment of money, became accustomed to recognize among themselves certain rights and liabilities in regard thereto. As law theoretically is founded on customs, this custom of merchants, when firmly established, was finally adopted as a part of the common law. (See, *post,* Appendix A, Negotiable Instruments Law, §7.)

The first kind of instrument to be treated by merchants as negotiable were bills of exchange, which originally were used in the settlement of debts by parties living in different countries. Promissory notes, usually being intended as mere evidence of indebtedness between two parties in the same locality, were not recognized as possessing negotiability until a later period. Checks are comparatively modern.

CONTINUANCE OF NEGOTIABILITY.

8. Generally an instrument negotiable as originally delivered remains negotiable; and an instrument originally non-negotiable never becomes negotiable.

The negotiability of an instrument is fixed at the time of its issue, and nothing occurring afterwards can change its original nature in this respect. (See, *post,* Appendix A, Negotiable Instruments Law, §77.) If negotiable when

issued it remains so until discharged, though there are a few apparent exceptions to this rule as will be noticed, *post,* in §50. (See, *post,* Appendix A, Negotiable Instruments Law, §332.)

Conversely, an instrument which in form is non-negotiable at the time of its issue never becomes negotiable by anything which may occur afterwards.

NOTES, BILLS, CHECKS—DEFINITIONS, FORMS.

9. **A Promissory Note is a written and signed promise to make payment to a person named therein, or to his order, or to bearer.**

   A Bill of Exchange or Draft is a written and signed order upon a person to make payment to a certain person designated therein, or to his order, or to bearer.

   A Check is a bill of exchange drawn on a bank for the payment, at all events, of a certain sum of money to a certain person named therein, or to his order, or to bearer, presumptively drawn against a deposit of funds, and payable instantly on demand.

The definitions given above are broad, being intended to apply to all instruments of the kind designated, whether negotiable or non-negotiable, and whether binding or not. The form only is referred to. The requisites for negotiability are set forth, *post,* in §21. The definition of a negotiable promissory note would include, in addition to the definition given above, clauses setting forth the elements of negotiability. Thus, a *negotiable promissory note* is an unconditional written and signed promise to pay a certain sum of money on demand or at a fixed and determinable future time to another person or order or bearer. (See, *post,* Appendix A, Negotiable Instruments Law, §320.)

The following is a common form of a negotiable promissory note:

$1,000.00 Denver, Colo., June 2, 1917.

Ninety days after date I promise to pay to the order of *James I. Ennis,* the sum of One Thousand Dollars, value received, with interest from date at the rate of five per cent. per annum.

T. A. FITZSIMMONS.

No. 1. Due: Aug. 31, 1917.

A form for a judgment-note and one for a collateral note will be found, *post,* in §24. A form for an installment-note and one for a coupon interest note is given, *post,* in §28.

A "certificate of deposit" issued by a bank, acknowledging the receipt of money and promising to repay it, is one form of a promissory note.

Some coupon-bonds issued by governments and by corporations resemble promissory notes, and may be negotiable. (See, *post,* Appendix A, Negotiable Instruments Law, §332.)

For brevity a promissory note is frequently designated merely as a "note."

A *negotiable bill of exchange* is an unconditional written and signed order by one person on another, to pay a sum certain in money on demand or at a fixed or determinable future time to a certain person named therein or order, or to bearer. (See, *post,* Appendix A, Negotiable Instruments Law, §210.)

The following is a common form of a negotiable bill of exchange:

$1,000.00 Saugatuck, Mich., June 2, 1917.

Thirty days after sight, pay to the order of *John W. Cornell,* One Thousand Dollars, value received, and charge the same to the account of

C. RANSOM WESTON.

To WALTER H. ECKERT,
No. 130 Fifth Avenue,
Detroit, Mich.

For brevity a bill of exchange is usually called a "bill." (See, *post*, Appendix A, Negotiable Instruments Law, §2.) The popular designation for a bill of exchange is "draft," it being *drawn* on a third person.

"Bill," as here used, means a brief writing (billet); and, having been issued for the purpose of exchanging values, naturally was called a bill of exchange.

The following is the ordinary form of a check:

CONTINENTAL AND COMMERCIAL NATIONAL BANK
OF CHICAGO. Number 41144.

Chicago, July 7, 1917. $1,000.00

Pay to the order of *Walter M. Pruyn,*

One Thousand.....Dollars.

CHARLES H. LANGER.

A check is one very common kind of a bill of exchange. (See, *post*, Appendix A, Negotiable Instruments Law, §321.) "Bank," as used in the definition of a check, is very comprehensive, including individuals and partnerships as well as corporations formed under the laws of any State or of the United States. All that is requisite is that the person or association addressed is carrying on the business of banking, although engaged in other business as well. (See, *post*, Appendix A, Negotiable Instruments Law, §2.) It is not required that the words "bank" or "banker" appear on a check; but if the name of the drawee does not indicate that he is a banker, it is good business to show that fact on the check, otherwise the holder might be justified in treating it as an ordinary bill of exchange.

In law "person" has a broad meaning, including not only human beings but associations of persons, and corporations. (See, *post*, Appendix A, Negotiable Instruments Law, §2.)

As will be seen from the above forms, a note is a promise to pay, while a bill is an order on a third person to pay.

The party signing a bill of exchange may have deposited money with the party addressed for the very purpose of drawing orders on it, either because the party ordering payment did not wish to assume the risk of keeping a large sum of money with him, or did not wish to go to the trouble of procuring it when needed, or because he wanted to make payments in some other place and desired a fund at that place with which to meet them so that he would not be bothered with transmitting sums of money, or, as is frequently the case, the party addressed, as the result of some prior transaction, might be the debtor of the party drawing the order, and the creditor took that method of collecting his debt. However, it is not requisite that the person addressed actually be the debtor of the party signing the order. A person might be willing to pay an order drawn on him although it resulted in his becoming a creditor by such payment instead of canceling or reducing his indebtedness; and if he agrees to pay the bill, it is immaterial to the person who is to receive the money, what the financial relations between the other parties are. However, a bill of exchange is usually received by the person to whom it is delivered, on the supposition that the person on whom it is drawn is indebted to the party who orders payment.

There are some resemblances between a promissory note and a bill of exchange. Each has two parties at its inception. A note is in the nature of an order by the signer on himself which he at once agrees to pay. A bill is an offer to the person addressed to become a promisor by undertaking to pay as directed in the bill. When he does assume the liability, the bill then becomes very much like a note signed by the person addressed.

NOTE—PROMISE IN.

10. A promissory note must contain a promise.

A promissory note, as its name indicates, is a promise; hence any instrument lacking a promise is not a promissory note. The courts, however, do not require any formality in regard to this point, holding any language to be a promise which indicates such an intention and can reasonably be construed to be such. The word "promise" is not essential, but there must be something equivalent to an express promise. Thus, the courts might imply a promise from the admission that a sum of money is a "loan," as such word indicates a promise to repay.

The mere admission of a debt, although in writing, is not sufficient to constitute a promise. As the law attaches more importance to a negotiable instrument than to most other simple contracts, the language used therein must indicate more than a recognition of a former indebtedness. A negotiable instrument, even though based on a prior indebtedness, is an entirely new obligation. Hence, a writing which acknowledges an indebtedness without any promise to pay it, not being a new obligation, is not negotiable; a suit to recover such indebtedness could not be based upon such a writing but would be based upon the original transaction out of which the debt arose, although the written acknowledgment might be excellent evidence and the only evidence of the former liability. A suit brought on a negotiable instrument is based on the instrument itself, and not on the consideration for which it was originally given.

Frequently merchants and others deliver memoranda, such as "Due L. M. Fell $100, value received," or "I. O. U. $100"; or a debtor, upon presentation of an account against him, might note thereon, "The above is correct," and sign his name. These are not promises; they do not create new obligations, and are not negotiable, unless expressly made so by statute. However, in these cases, if the debtor had added to his notation the words, "to be paid on" a desig-

nated date, or "on demand," a promise to pay might reasonably be inferred and a negotiable instrument would result if the other elements of negotiability were present.

BILL—ORDER IN.

11. A bill of exchange must contain an order.

Bills of exchange originally were based on the fact that the person addressed had funds belonging to the signer which the latter had a right to demand, and this now is the theory in every instance, although it may not be a fact and all of the parties may know that the addressee does not have any funds, provided such fact be not apparent from the instrument itself. Although not a debtor of the signer of the bill, the party addressed may be willing to become his creditor. If money be ordered paid, it is sufficient. If the instrument indicate on its face that it is not an order but merely a request, as for a loan, or that payment by the addressee is optional, it is not a bill of exchange and, hence, not negotiable, even though the person addressed had funds of the signer and would pay. To be negotiable—to pass as money, an instrument on its face must indicate liability; it would not accomplish its purpose if a person had to make inquiry, before he received a bill of exchange, whether the person addressed had funds belonging to the signer.

The use of polite forms in instruments sometimes makes their construction difficult. A writing may be mandatory although couched in courteous terms; on the other hand, additions to what is an order in form may indicate that merely a favor is asked. Thus, it has been held that, "Mr. *B* will much oblige Mr. *A* by paying *C* or order," etc., is an order, and sufficient to constitute the instrument a bill of exchange and negotiable; while, "Please to let the bearer

have $100 and place it to my account, and you will oblige your humble servant" was a request for a favor, and not a bill of exchange. In case of doubt as to the meaning of the language used, the courts are inclined to presume that an order was intended.

Authorizing payment is not ordering it. Thus an instrument beginning, "We hereby authorize you to pay on our account to the order of *C*" merely gives the addressee an option to pay or not. If he pays, the instrument would simply become a voucher in his hands. It is not a bill of exchange, and, hence, not negotiable.

CHECK—ELEMENTS OF.

12. A check must—

Be addressed to a bank.

Be payable instantly on demand.

Not purport to be drawn on a fund other than a prior deposit by the person signing it.

A prior agreement by a bank to pay checks is presumed.

While a check is but one kind of a bill of exchange (see, *post,* Appendix A, Negotiable Instruments Law, §321), it is a very important one because it has become the most common negotiable instrument. It is necessary, therefore, to notice the features which distinguish it from other bills of exchange.

Any bill of exchange might be drawn on a bank or banker, but a check must be.

Any bill of exchange might be payable on demand, but a check must be. If an instrument be in form a check but bear a date later than the day of delivery, it is technically not a check but an ordinary bill of exchange until the day of its date arrives, when, chameleonlike, it instantly changes into a check without any action being taken by anyone.

A bill of exchange may designate a particular fund from which it is to be paid, or it might be drawn against a fund yet to be acquired by the addressee, as "rents to be collected." This might make it non-negotiable (see, *post,* §26), though it nevertheless is a bill of exchange. A check, however, must not purport to be drawn against any fund except a prior deposit made in the bank for the purpose of paying checks. A check is not required to designate any fund and usually is silent on this point, a previous deposit of funds being presumed; but an instrument, although having the other essentials of a check, which specifies any other fund than a prior deposit from which it is to be paid, is not a check but an ordinary bill of exchange which may or may not be negotiable.

A prior agreement between the bank and the signer of a check thereon, that it will be paid when presented, is presumed (see, *post,* §110); in a bill of exchange, although the addressee is presumed to have in his possession funds of the party ordering payment, there may not have been any agreement by the addressee to pay orders on such fund, hence there is no presumption of any such agreement. The fact that there was no such express or implied agreement between the bank and the signer of a check, this fact being unknown to the holder, would not prevent an instrument from being regarded as a check; and a previous agreement by the addressee of a bill of exchange that it would be paid when presented, this fact being known to the holder, will not change the character of the instrument in any way. Such circumstances are not uncommon.

In an ordinary bill of exchange the name of the addressee usually appears in the lower left-hand corner thereof; in a check the name of the bank usually appears at the top. This, however, is custom merely and not of any legal importance.

The distinctions just mentioned are those which appear on the face of the instruments themselves. There are some other distinctions between a check and other kinds of bills of exchange arising from the effect of subsequent action by the holder thereof.

If the addressee in an ordinary bill of exchange agrees with any holder thereof to pay it, the liability of the signer remains; but if a bank promises the payee or any subsequent holder of a check to pay it, the party signing it is instantly freed from liability. (See, *post,* §106, and Appendix A, Negotiable Instruments Law, §324.)

The signer of an ordinary bill of exchange is generally entitled to have notice if it is not paid by the addressee as expected, and the signer is completely discharged if notice be not given promptly whether loss results or not (see, *post,* Chapter VI); the party signing a check is not discharged by delay in giving him notice of non-payment unless he has been caused actual loss by such delay. (See, *post,* §112.)

BILLS—CLASSIFICATION.

13. Bills of exchange are classified as:
Foreign.
Inland.

A Foreign bill of exchange is one which on its face shows that it was drawn in one State and made payable in another.

An Inland bill of exchange is one which on its face purports to be both drawn and payable within the same State.

The law makes a distinction between bills of exchange which are drawn and payable in the same State and those which are drawn in one State and payable in another, the former being known as inland bills of exchange and the

latter as foreign bills of exchange. (See, *post,* Appendix A, Negotiable Instruments Law, §213.) The place of residence of the parties is not considered in this classification; nor do private agreements between the parties, not apparent from the instrument, affect other persons in ignorance thereof. As was stated, *ante,* "Elementary Law," §10, each of the United States is foreign to the others; so that a bill of exchange drawn in one of them and payable in another would be a foreign bill of exchange and subject to rules somewhat different from those applying to an inland bill of exchange, as will be noticed later. (See, *post,* §95; and Appendix A, Negotiable Instruments Law, §§189, 260.) A bill of exchange drawn and payable practically in the same city might be a foreign one if the State line ran through the city, as is not uncommon in this country, and the bill was drawn on one side of such State line and payable on the other side, although just across the street.

If an instrument does not show on its face that it is a foreign bill, that is, if the name of a city only appears without any State or country, the presumption is that it is an inland bill, and the holder may treat it as such (see, *post,* Appendix A, Negotiable Instruments Law, §213) although the city named might be a well-known one and in another jurisdiction. Thus, a bill of exchange dated at "London" and payable in "Paris" would be presumed to be an inland bill of exchange; while a bill drawn at "Council Bluffs, Iowa," and payable at "Omaha, Nebraska," would be presumed to be a foreign one.

Foreign bills are frequently drawn in sets, usually three: that is, there are three or four bills exactly alike except that one is designated as "first," the next, "second," and so on, and each containing a condition that it shall be payable only in event of the remaining ones being unpaid. Thus the first would

begin: "Thirty days after sight of this First of Exchange (Second and Third Unpaid) pay to," etc. This custom originated in former times when means of communication were uncertain and losses not uncommon. By drawing bills in sets and sending each part by a different vessel, there was reasonable certainty of at least one of them reaching its destination without loss. Where a bill is drawn in a set, each part being numbered and containing a reference to the other parts, the whole constitutes but one bill. (See, *post,* Appendix A, Negotiable Instruments Law, §310.)

PARTIES—CLASSIFICATION.

14. In the broad sense of the word, a Party to a negotiable instrument is one who has rights or duties in connection therewith.

Parties are given various designations, and, hence, are subject to several classifications, the more common being—

As to time:
- **Original.**
- **Subsequent.**

As to degree of liability:
- **Primary.**
- **Secondary.**

As to consideration:
- **Accommodation.**
- **Accommodated.**

As to defenses:
- **Immediate.**
- **Remote.**

In the comprehensive meaning of the word, a Party to a negotiable instrument is one who has rights or duties in connection therewith which can be enforced in court, although his name may not appear on the instrument. In a

narrower and more frequent use of the word, a party is one whose name appears on the instrument.

Sometimes "parties" is used in a still more restricted sense, indicating only such as were parties when the instrument was first issued, that is, original parties.

Parties are subject to several though somewhat loose classifications which are based on various standpoints. They may be classified, as to the time of issue of an instrument, into original and subsequent; as to the degree of their liability, into primary and secondary; as to consideration, into accommodation and accommodated; as to defenses, into immediate and remote or mediate; as to number, into indispensable or necessary and optional; as to specification, they may be specified or unspecified, and, if specified, they may be genuine or fictitious; as to the nature of their liability, they may be ostensible or apparent and actual.

These various designations may enter into several different combinations; and some of them do not apply to the parties to every negotiable instrument. It being necessary to begin at once to make use of some of the terms used in designating parties, such terms will be explained now more or less briefly, leaving more complete treatment of some of them to subsequent chapters.

PARTIES—ORIGINAL AND SUBSEQUENT.

15. The original parties to a promissory note are the—
    Maker, the one signing the instrument and promising to pay it.
    Payee, the one to whom payment is promised.

    The original parties to a bill of exchange are the—
    Drawer, the one signing the instrument and ordering payment.
    Payee, the one to whom payment is ordered to be made.

A bill of exchange names a Drawee, the one who is ordered to pay it, who may or may not be an original party. If he agrees to comply with the order to make payment he then is known as the Acceptor.

A Holder is a party having possession of an instrument and the legal title thereto.

The Bearer of an instrument is one rightfully in possession of an instrument which in effect is payable to anyone who bears it.

As a negotiable instrument is a contract, it must, as any contract, have at least two parties at the time it is issued. (See, *ante,* "Contracts," §11.) A promissory note requires a maker, who promises to pay, and a payee to whom payment is promised (see, *ante,* "Contracts," Illustrative Case No. 4); a bill of exchange requires a drawer, who signs the order, and a payee to whom payment is ordered. These are the original parties and indispensable; and the instruments would be and remain valid contracts if there never were any more parties, as frequently is the case. Other persons may become original parties by consent, such as guarantors. A bill of exchange designates a third person, known as the "drawee," who is ordered to pay it; he frequently is spoken of as a party, but, strictly speaking, he is not a party until he agrees to pay. He may have entered into the agreement before the bill is delivered to the payee so that he actually is an original party; or he may enter into this agreement after such delivery. Whenever he agrees to become liable for payment he is known as the "acceptor." (See, *post,* Chapter III.)

A check being one form of a bill of exchange (see, *post,* Appendix A, Negotiable Instruments Law, §321), the parties are designated the same as in any bill of exchange, though it is not incorrect to speak of the party signing a check as the "maker," and the drawee is usually spoken of as "the bank."

Negotiable instruments frequently are drawn with one person occupying two capacities, so that there appears to be

but one party, such as a promissory note payable to the order of the maker, but such an instrument is not a contract until the maker orders payment to some other person and delivers the instrument, by which act the other party at once comes into existence. (See, *post,* Appendix A, Negotiable Instruments Law, §320.)

Parties frequently are specified by name or description, being parties in a narrow sense of the word. (See, *ante,* §14.) In the broad sense of the word, some parties are not named. Thus, "bearer" usually indicates an unspecified party, so that an instrument in terms or effect payable to bearer might be transferred many times without the designation of any transferee.

A negotiable instrument is intended to circulate; hence between the time of its issue and the time of its ultimate discharge it may pass through many hands, so that subsequent parties arise. In its circulation the person parting with possession is broadly known as the transferror, and the person receiving it from him, as the transferee. If a person write his name on the back of an instrument, especially for the purpose of transferring title, he is called an "indorser" (see, *post,* §46); and if a person is designated as the transferee in such a case, the latter is called an "indorsee." (See, *post,* §49.) A person rightfully in possession of a negotiable instrument at any particular time is known as the "holder," who will be the payee if the instrument has never left his possession; or the holder may be a transferee. In many cases "holder" and "bearer" are used synonymously; but technically they do not have quite the same meaning, the former being a broader term. A "bearer" is a "holder," but a "holder" is not necessarily a "bearer." To constitute one a "bearer" of a negotiable instrument, it must, either by its original terms or by subsequent indorsement, be in effect payable to whomsoever may be in posses-

sion without specifying him. (See, *post,* §§31, 49.) A person may be the holder of a negotiable instrument yet technically not the "bearer" because the instrument is not payable to bearer but to some designated person, who holds it. (See, *post,* Appendix A, Negotiable Instruments Law, §2.) As will be seen, *post,* in Chapter IV, a negotiable instrument may be assigned as any money claim, in which case the designations of "assignor" and "assignee" are properly applied.

The word "subsequent" is also used to indicate those who became parties after some designated holder; and all others, as to this particular holder, are "prior" parties. Thus if a promissory note signed by *A* and payable to *B* should pass by transfer to *C, D, E,* and *F* successively, and the rights and liabilities of *D* are being discussed, *A, B* and *C* would be referred to as prior parties, and *E* and *F* as subsequent ones, although from the standpoint of the issuance of the instrument, all parties after *B,* the payee, would be spoken of as subsequent ones, and *A* and *B* as original parties.

PARTIES—PRIMARY, SECONDARY, ACCOMMODATION.

16. **A party is primarily liable on a negotiable instrument where it is his duty, as to others also liable, to pay it, and whose payment completely discharges the instrument and all parties thereon.**

A party may be secondarily liable where he may be compelled by some holder of the instrument to pay it, but whose payment does not necessarily discharge the instrument, and who, on payment, has a right of reimbursement from some other party.

An Accommodation party is one who became a party without recompense, for the purpose of lending his name as a means of credit to another person known as the Accommodated party.

An instrument bearing the name of an accommodation party is known as Accommodation Paper.

There may be several persons liable on a negotiable instrument, but, unless their liability is joint, only one of them is primarily liable, that is, should pay the instrument, whose payment completely discharges it and terminates the liability of all other parties thereon. If any of the other parties, instead of the party primarily liable, should be called upon by the holder to make payment, the instrument itself would not be discharged, and the party paying could in turn call upon some other party for reimbursement. (See, *post,* Chapter VII.) Such other parties are known as secondary or collateral parties. (See, *post,* Appendix A, Negotiable Instruments Law, §3.) Their payment is not a complete discharge of all liabilities. (See, *post,* Appendix A, Negotiable Instruments Law, §202.) There are different degrees of liability even among secondary parties, for a secondary party, after paying the instrument, may have a right to reimbursement from several other parties, and this right continues until ultimate recovery is had from the party primarily liable. Thus, a promissory note signed by *A* is made payable to *B* for a loan from *B* to *A*. *B* indorses the note to *C* and it subsequently passes by indorsement to *D* and *E* successively. *A* is the party primarily liable, as he received the money for which it was given. It is his duty to pay the note when due; and his payment would completely discharge the note and terminate the liability of all parties thereon. [See, *post,* Negotiable Instruments Law, §200(1).] *E,* however, might have a right to hold *B, C,* or *D*; but if he recovers from *C,* for illustration, the note

would not be discharged, and *C* would have the right to compel either *A* or *B* to pay it to him. If *C* should recover from *B*, *B* in turn could compel *A* to pay, and when *A* pays *B* the instrument would be discharged. *B*, *C* and *D* were secondarily liable to *E*. Secondary liability might exist when an instrument is issued, as by having a guarantor of payment, or a surety thereon designated as such, but it usually springs up subsequently as indorsements are made.

Sometimes a person becomes a party to a negotiable instrument without receiving any benefit therefrom, merely for the purpose of lending credit. Such a party is known as an "accommodation" party; the person for whose benefit he becomes a party is called the "accommodated" party; and instruments of this character are known as "accommodation paper." Thus, *A* wishes to borrow a sum of money, but he has no financial standing, nor any property to offer as security for a loan. His friend *X* is a millionaire and willing to lend his credit to *A*. A note signed by *X* is made payable to *A* who indorses and delivers it to the person lending *A* the money. *X* receives nothing, yet he is liable on the note to the holder although the holder knows all the facts. (See, *post,* Appendix A, Negotiable Instruments Law, §55.) The consideration for the promise by *X* to pay the note is the disadvantage sustained by the lender in parting with his money in reliance on the promise by *X*. (See, *ante*, "Contracts," §28.) *X* is an accommodation party and *A* is the accommodated party. *X* is the ostensible maker of the note, but *A* is the actual debtor though named a payee and apparently having the right to demand payment from *X*. Any holder except *A* can treat *X* as the party primarily liable because he voluntarily has assumed that liability; but as between *A* and *X*, *A* is primarily liable and should pay the note when due, and if he does, he cannot hold *X* [see, *post,* Appendix A, Negotiable Instruments

Law, §200 (2)], whereas if *X*, the apparent maker, should pay the note he would have a right to be indemnified by *A*, the ostensible payee, for between themselves, *X* is secondarily liable.

It is immaterial what capacity an accommodation party or the accommodated party appears to occupy on a negotiable instrument. Thus, either of them might apparently be the drawer, the payee, an indorser, or the acceptor of a bill of exchange; or they might appear to be jointly liable in some capacity. So long as the accommodation party does not receive any value but signs his name simply for the purpose of aiding the accommodated party, he can show the facts as between himself and the accommodated party, though he is liable to all other holders of the instrument in the capacity which he appears to occupy on the instrument.

A person might be in a position of an accommodated party without his name appearing on the instrument at all. Thus, referring to the above illustration, *X* might have made the note payable directly to the lender without *A's* name appearing; though this would be unusual.

An accommodation party, whatever apparent capacity he may assume, is a surety in the broad sense of that word, but is known as a "concealed" surety if nothing appears on the face of the instrument to indicate his true relation. (See, *post*, §81.) He might add "surety" or some other similar word after his signature, in which case he must be treated as such, though still liable to everyone, except the accommodated party, in the capacity which he has assumed as a party to a negotiable instrument. The rights and liabilities of sureties will be more fully discussed in Volume VI.

PARTIES—IMMEDIATE AND REMOTE.

17. Immediate parties are those dealing with each other in regard to the instrument.

Remote parties are those who have not dealt with each other in regard to the instrument.

Although a negotiable instrument may pass through many hands, it necessarily does so a step at a time, each step involving some deal between successive holders. These two successive holders would of course know all about the facts which led to the transfer from one to the other, but the transferee might not know and is presumed not to know how the transferror or any former holder acquired the instrument, any more than a person receiving money would ordinarily know or care how the person paying it or any former owner may have obtained possession thereof. Likewise, the transferror of a negotiable instrument is usually not interested in the disposition made of it by any subsequent holder. The parties to any particular transfer of a negotiable instrument who deal directly with each other are known as "immediate" parties; while parties who have not had any dealing with each other in regard to the instrument are "remote." Thus, a promissory note signed by *A* is made payable to *B*. *B* indorses it to *C*, and it subsequently passes to *D* and then to *E*. It is evident that each transfer necessitated a deal between some two of these parties. *A* dealt with *B* in some transaction which led to delivery of the note to *B*; they are immediate parties. *B* had dealings with *C* which led to the transfer of the note to *C*; *B* and *C* are immediate parties, but *A*, the maker, may not know anything about this transfer to *C* or the reasons therefor, or may never have heard of *C*; *A* and *C* are remote parties. *A* is likewise a remote party as to *D* and *E*. *C* and *D* are immediate parties, and so are *D* and *E*, but *C* and *E* are remote. *E* would be remote as to all prior parties except *D* with whom he dealt. Whether parties are immediate or remote becomes very important when some defense exists against payment of a negotiable instrument, as will be

noticed, *post,* in §71. If a negotiable instrument passes through several hands, each holder is generally an immediate party as to the party from whom he receives the instrument and as to the party to whom he transfers it, but a remote party as to all other holders.

AMBIGUOUS INSTRUMENTS.

18. If there be a doubt whether an instrument is a bill of exchange or a promissory note, the holder can treat it as either at his election.

Sometimes an instrument is so drawn as to make it doubtful whether it is a bill or a note. Thus, a person signs an instrument in the form of a bill of exchange but addressed to himself. This may be treated by the holder as a bill of exchange, because it possesses that form, or as a promissory note because it is in effect a promise by the drawer to pay. [See, *post,* Appendix A, Negotiable Instruments Law, §§36 (5), 214.]

Likewise, if the drawee in a bill of exchange be a fictitious person or one lacking capacity to contract, the holder can treat the instrument at his option either as a bill of exchange or as a promissory note. (See, *post,* Appendix A, Negotiable Instruments Law, §214.) So, a bill of exchange in form but not addressed to anyone can be treated as the promissory note of the drawer.

It is not uncommon for one officer of a corporation, as the president, to order another officer in the same corporation, as the treasurer, to pay a sum of money, both officers acting on behalf of the corporation, so that the instrument is similar to a bill of exchange drawn by the corporation on itself. Such an instrument can be treated by the holder as a bill of exchange, or as the promissory note of the corporation.

DRAWER—ADMISSIONS.

19. The drawer of a bill of exchange impliedly undertakes, in the absence of express stipulation to the contrary, that—

The drawee exists.

The drawee can be found at the place designated.

The drawee has capacity to accept.

The drawee will accept the instrument, if it be necessary to accept it, and that he will pay it, when properly presented.

The payee exists.

The payee has capacity to indorse.

The drawer will indemnify the holder, or any subsequent indorser compelled to pay the instrument, if the drawer be promptly notified that the instrument has not been accepted or paid as it should have been.

As was said, *ante*, in §15, the original parties to a bill of exchange may and frequently do consist of the drawer and the payee, and these two alone would be sufficient to make the instrument a valid contract and negotiable, although neither of them has expressly promised therein to do anything. On its face the instrument is merely an order by the drawer to a third person, the drawee, to pay to the payee a designated sum of money. The drawee is not technically a party to such an instrument as he has not promised to pay it, and may not even know anything about it; nor does he become liable thereon in any way until he does promise to pay it. (See, *post*, Appendix A, Negotiable Instruments Law, §211.) The drawee named might be a non-existent person. It is evident, therefore, that the contract by the drawer must be implied, and the law does imply terms in a bill of exchange which are based on the pre-

sumed intention of the parties. A person taking a negotiable instrument should have a right to rely on facts reasonably inferred from the very act of issuing it. A circulating medium accomplishes its purpose better in proportion to the confidence that can be placed in it.

The implied contract which the drawer makes, not only with the payee but with every subsequent holder of the instrument, is that the drawee designated in the instrument actually exists; and, if the address of such drawee has been designated, that he will be found there at reasonable hours; that such drawee has legal capacity to agree to pay the instrument and will agree to pay and will pay it at the time designated therein, provided the holder in turn has done all that the law requires. (See, *post,* §82; see, also, Appendix B, Case No. 34.)

The drawer also impliedly represents to future holders that the payee named in the bill of exchange actually exists, and that he has capacity to indorse the bill at the time it is delivered to him.

These representations or admissions are sometimes called the drawer's implied warranties; but they do not exist if he has inserted in the bill any stipulation negativing or limiting them. (See, *post,* Appendix A, Negotiable Instruments Law, §111.)

If any of the implied representations of the drawer is not true, he has broken his contract, and is liable for such breach as in the case of any contract.

The drawer further impliedly agrees to indemnify the holder, or any subsequent indorser who may be compelled to pay the bill, against loss resulting if the drawer's implied representations in regard to the drawee's acceptance and payment are not true, provided the proper steps have been taken by the holder as set forth, *post,* in Chapter VI.

If a bill has been drawn in a set, and two or more of its parts are transferred to different holders, the implied contract of the drawer is with the holder whose title first accrues, and not with the holders of the other part or parts. (See, *post,* Appendix A, Negotiable Instruments Law, §311.)

CHAPTER II.

REQUISITES.

20. Elements as a Contract.
21. Elements of Negotiability.
22. Writing and Signature.
23. Payment of Money.
24. Collateral Agreements.
25. Certainty as to Amount.
26. Conditions.
27. Certainty as to Time of Payment.
28. Payment in Installments.
29. Payment on Demand.
30. Payment On or Before a Determinable Time.
31. Certainty as to Parties.
32. Words of Negotiability.
33. Inartificial Instruments.
34. Non-Negotiable Instruments Assignable.
35. Quasi-Negotiability.
36. Date—Place—Consideration—Seal.

ELEMENTS AS A CONTRACT.

20. A negotiable instrument, and all contracts based on it, should possess the elements of any contract.

Not only is a negotiable instrument itself a contract, but every subsequent transfer thereof, though based on the instrument, is an entirely new contract; and not only does the transfer itself usually result from a contract, but in addition each transfer may at once cause almost as many new contracts to come into existence as there are persons who have formerly had anything to do with the instrument, as each party's contract is usually made, not only with the

person with whom he deals, but with each subsequent holder severally and not with all subsequent holders jointly. (See, *post,* §§68, 79.) This is one of the peculiarities of negotiability, resulting from the fact that a negotiable instrument when issued is intended subsequently to pass from hand to hand, so that the parties thereto in effect make an offer to each subsequent holder which is assented to by each holder through the act of acquiring the instrument without notice of anything which would constitute a revocation of the offer, and the new agreement is then complete.

Thus, a bill of exchange, drawn on *A* by *B,* is made payable to *C,* which *C* indorses to *D.* *D* presents it to *A* who agrees to pay it. *D* then indorses it to *E.* *A,* by his agreement, entered into a contract with *D* that he will pay *D.* (See, *post,* Appendix A, Negotiable Instruments Law, §112.) *A* at the same time, by his act, entered into a contract with *B* that he would indemnify *B* if the latter should be compelled to pay *C* or *D* or any subsequent holder. *A* further made a contract with *C* to indemnify *C* if he should be compelled to pay *D* or any subsequent holder. The contract with *B* was distinct from that with *C* and with *D,* and that with *C* was distinct from that with *D;* that is, *A* did not enter into a contract with *B, C* and *D* jointly, but severally. *A* further made an offer to pay any subsequent holder who acquires the instrument in good faith, and to indemnify each subsequent holder who is required to indemnify any still later holder. *E* accepts this offer by acquiring the instrument, thus forming a valid contract with *A.* *B,* when he delivered the bill to C, made a contract to pay him if *A* did not pay it, or to indemnify *C* if *C* was compelled to indemnify still later holders. (See, *post,* Appendix A, Negotiable Instruments Law, §111.) *B* likewise made a similar offer to each subsequent holder, which was accepted by *D,* and later by *E,* so that two independent contracts

subsequently arose to which *B* became a party. *C*, by his indorsement to *D*, entered into a contract transferring the title to *D* and agreeing to pay him if *A* did not pay the bill, or to indemnify *D* if the latter was compelled to pay any holder after himself. (See, *post*, Appendix A, Negotiable Instruments Law, §116.) *C* made a similar offer to each subsequent holder after *D*, which offer was accepted by *E* when he acquired the instrument. *D*, by his indorsement to *E*, entered into a contract with him similar to the one between *C* and *D*, and made offers to subsequent holders, if any, similar to the offers made by *C*. So far there are at least ten distinct contracts arising from one instrument, with outstanding offers from *A*, *B*, *C*, *D*, and *E* so that another indorsement would cause five more contracts to come into existence.

Each of these contracts should possess all of the elements of any contract (see, *ante*, "Contracts," §9); but the fact that one or more of them do not possess the requisite elements will not necessarily affect the validity of the others. The parties should be competent. If the maker of a promissory note be an infant, his contract is voidable, not only as to the original payee, but as to each transferee with whom he has entered into contract by the subsequent acceptance of his offer. (See, *post*, §80.)

The general rule that an agreement between alien enemies is invalid (see, *ante*, "Contracts," §21) applies to negotiable instruments. However, there is an exception to this rule. Courts are inclined not to apply a rule of law when the reason for it ceases. The reason for the rule making an agreement with an alien enemy void is that the hostile country may benefit from the agreement; hence, if the hostile country cannot benefit, there is no reason for applying the rule. Thus, where a bill of exchange is drawn on a resident of the hostile country and payable to another such resident, the instrument is valid.

The contract contained in a negotiable instrument, and every contract based thereon, should have a consideration; but the absence of a consideration as to one contract of these contracts will not necessarily affect the others. (See, *post,* §81.) Thus if *A* should give *B* a promissory note in payment for goods which *B* never delivers, and *B* indorses the note to *C* who pays *B* for it, the failure of consideration in the contract between *A* and *B* may not apply to the contract between *A* and *C,* as there is a consideration for the latter—*C* having sustained the detriment of parting with his money to *B* in reliance on the promise by *A* to pay. It is not necessary for the promisor to receive the benefit of the consideration in order to bind him. (See, *ante,* "Contracts," §28; and, *post,* Appendix A, Negotiable Instruments Law, §52.)

Likewise the various contracts growing out of a negotiable instrument must be legal; but one may be illegal without affecting the others. (See, *post,* §81.) Thus, in the illustration just given, if the goods which *B* was to deliver to *A* were, to *A*'s knowledge, to be smuggled into the country for that purpose, the contract between *A* and *B* would be illegal, but the contract between *A* and *C* is a different one, and not necessarily illegal if *C* is ignorant of *A*'s illegal intention. (See, *ante,* "Contracts," §42.)

The consent in each of the various contracts should be genuine; but lack thereof in one of them will not necessarily affect the others. (See, *post,* §81.) Thus, referring to the above illustration again, if *B* obtained the note from *A* by fraudulent representations, the contract between them could be avoided by *A,* the defrauded party, but *C* may not be a party to the fraud, so that the contract between *A* and *C* would be binding, as a contract cannot be avoided against one not a party to the fraud in some way. (See, *ante,* "Contracts," §59.)

If the instrument showed on its face that it lacked any necessary element of a contract, then such defect would enter into subsequent agreements based thereon, and affect them to the same extent as the original contract was affected. (See, *post,* §§73, 80.)

As between immediate parties (see, *ante,* §17), a negotiable instrument does not create any rights until the instrument has been voluntarily delivered by the party liable thereon (see, *post,* Appendix A, Negotiable Instruments Law, §35); but, as will be seen *post,* in §81, subsequent innocent holders may be able to enforce an instrument though its possession was improperly obtained by some former holder. When one party deposits an instrument in the mail for transmission to another party, it constitutes delivery by the former to the latter.

One of the most important elements of a negotiable instrument as a contract is the requirement as to form, to which the greater part of this chapter will be devoted.

ELEMENTS OF NEGOTIABILITY.

21. To be negotiable a contract must possess the following requisites:

1. **It must be in writing and signed.**
2. **It must call for the payment of money alone.**
3. **The amount must be certain.**
4. **It must be unconditional.**
5. **The time of payment must be certain to arrive.**
6. **The parties must be designated specifically.**
7. **It must contain words of negotiability.**

From what has been said in the preceding chapters, it will be noticed that contracts calling for the payment of money may be divided into two great classes—negotiable and non-negotiable. It is evident that a line is drawn some-

where between these two classes, and it becomes very important to understand just where such line is drawn—to know what instruments bestow upon a holder the rights and privileges accompanying negotiability and possess the characteristics of money, and what do not. On this point there has been much litigation; and the rules laid down by the courts and followed in the Negotiable Instruments Law (see, *post,* Appendix A, Negotiable Instruments Law, Article II) are quite technical. In order to play the part of money in commerce an instrument, although valid as a contract and assignable, must possess certain requisites. Two instruments may be very similar in wording and in appearance, yet while one passes as money giving rights to one person not possessed by a former holder, the other instrument is not negotiable but assignable merely and subject to all defenses which could have been made against it at any time.

The different requirements of negotiability must be apparent from the contract itself, and they will now be taken up one by one and discussed.

WRITING AND SIGNATURE.

22. A writing will be negotiable, although very informal, if it contain all the elements of negotiability.

Anything intended as a signature by the party to be bound is sufficient.

It needs little argument to sustain the proposition that, to be negotiable, a claim must be evidenced in writing and signed. This would be evident from the word "instrument." Even when a transaction is confined to two parties disputes frequently arise as to what was said; and there would be endless trouble if a claim transferred from hand to hand depended upon oral testimony as to just what the

contract was. An oral promise would be greatly distorted after a few repetitions, and could not possibly play the part of money.

The legal effect of an instrument is the same whatever the material upon which it is written. A check written with chalk upon a shingle would be valid and negotiable; though good business requires a medium which resists wear and is not easily altered.

In law "writing" includes typewriting, printing, engraving, and other similar means for giving visible form to words (see, *post*, Appendix A, Negotiable Instruments Law, §2); and the writing may be very inartificial and ungrammatical and the words misspelled without interfering with negotiability in the least, provided the terms shown by the writing possess all of the other elements of negotiability.

It is evident also that a writing which is not signed could not be negotiable, although the party who issued it might be known, as an unsigned writing is of no more legal effect than an oral promise, and could not play the important part of money. To be negotiable a contract must indicate the party who can be called on to perform it. [See, *post*, Appendix A, Negotiable Instruments Law, §20(1).]

As in the case of any contract, the law is very liberal as to what constitutes a signature, and anything intended by the signer as such will suffice, such as initials, a rubber-stamp or typewriting. Likewise, a signature need not appear at the bottom. A name written at the beginning or in the body of the instrument will suffice if there was an intention to be bound. Thus, a note beginning, "I, Ralph D. Spaulding, promise to pay," etc., without Ralph D. Spaulding adding his name at the end is regarded as being signed if Ralph D. Spaulding himself wrote the instrument or directed it to be so written. Practically, however, any signature other than a name in full written in ink at the end,

would interfere seriously with, or entirely prevent, subsequent circulation of the instrument, as, if disputed, its genuineness, or the intention, might be difficult of proof.

PAYMENT IN MONEY.

23. An instrument is not negotiable, although calling for the absolute payment of money, if there is a promise to deliver or to perform something in addition thereto.

An instrument may be negotiable although calling for payment in a particular kind of money.

An instrument is not negotiable which, although providing for the payment of money, gives an option, to the party liable thereon, to perform some other act in lieu thereof.

An instrument may be negotiable which promises to pay money although the holder has an option, by its terms, to demand something else in lieu thereof.

An instrument which promises to pay money may be negotiable although it may contain an additional agreement if such agreement does not affect the liability to make payment as promised, and does not call for the performance of some additional act.

To be negotiable an instrument must call for the payment of money. An instrument calling for the delivery of any other property or giving a right to demand the performance of services would be uncertain as to the value represented by it, and could not take the part of money which represents definite value fixed by law and is the measure of value.

Thus, a promise to pay "in a good horse to be worth $80, and goods out of store amounting to $20" would not be negotiable although it might seem to call for the value of $100. The value of goods is very largely a matter of opinion (see, *ante,*

"Sales," §16); and probably few persons would agree upon the exact value of the horse and goods which might be tendered in performance of this promise. Besides, values of commodities fluctuate, so that an instrument calling for the delivery of goods would not be definite enough to play the part of money. Equally uncertain would be the value if the instrument had called for "one horse" although a specific horse was described. In a few States instruments of this character are negotiable.

Although an instrument may call for the payment of money absolutely, it may also contain an agreement to do something else. If such agreement is a promise to perform something in addition to the payment of money, the instrument is non-negotiable. (See, *post,* Appendix A, Negotiable Instruments Law, §24.)

Thus, a promise to pay "$100 in cash and $100 in work," would not be negotiable. Although the first part is definite enough, the value of the services would make the total value too indefinite.

The mere fact that an instrument designates a particular kind of money in which it is to be payable will not render it non-negotiable if that kind of money be legal tender. [See, *post,* Appendix A, Negotiable Instruments Law, §25(5).] Thus, a promise to pay a designated sum "in currency" or "in gold" is not uncommon and will not affect negotiability, the value being definite.

Sometimes an instrument calls for the performance of two or more acts in the alternative, one of them being the payment of a definite sum of money, in which case negotiability depends on whether the promisor or whether the holder of the instrument has the right to exercise the option as to the manner of performance. Thus, the negotiability of a promise to pay $1,000 or, in lieu thereof, to deliver diamonds, would depend on whether the promisor had the choice of paying money or of delivering diamonds or whether the holder had the right of demanding money or

demanding diamonds. If the promisor had the option, the value of the instrument would be indefinite, as he might elect to deliver diamonds, whose exact value would be uncertain. If, however, the instrument indicated that the holder had the right to designate which promise should be performed, it would be negotiable, as the promisor would be bound to pay money if demanded, so that the instrument might be regarded as worth $1,000 in any event, and its value would be definite enough to take the part of money. [See, *post,* Appendix A, Negotiable Instruments Law, §24(4).]

Generally an instrument calling for payment in money is not rendered non-negotiable by the mere fact of its containing some additional agreement not affecting the manner of performance. Some provisions of this character, not uncommon in negotiable instruments, will be considered in the following section.

COLLATERAL AGREEMENTS.

24. An instrument is not rendered non-negotiable merely by reason of a provision which—

Gives power to confess judgment.
Gives power to dispose of collateral.
Waives benefits given by law.

Negotiable instruments are frequently rather long and formal contracts, especially if taken by financial institutions. Following the part calling for payment in the ordinary form, are numerous provisions, usually in small type for the sake of compactness, which are intended to secure and to protect the holder and which are purely for his advantage. They are likely to work a corresponding disadvantage to the party liable on the instrument. If the signer is unable to obtain what he desires except on terms imposed by

the party taking the instrument, the signer must accede to the terms; but otherwise it is unwise for the signer to give up his legal rights for the benefit of a holder whom he may not know. Many a person has been either ruined financially or subjected to much trouble and expense because he signed a note without reading it or because he did not understand the legal import of the language appearing therein. Such provisions do not prevent negotiability as long as they do not interfere with the right of the holder to demand the absolute payment of money. Provisions of this character are those authorizing the holder to cause a confession of judgment to be entered against a party liable thereon, to sell collateral security, and to waive the benefit of laws intended for the advantage or protection of the party liable.

What is known as a "judgment-note" contains a warrant of attorney authorizing a confession of judgment against the maker in favor of the holder. Ordinarily, if a note is not paid when due, the holder must bring suit thereon, giving the maker notice thereof so that he may appear in court if he wishes to do so, and the maker is entitled to some time in which to prepare a statement of any defense he may have. If, however, a note contains a warrant of attorney for that purpose, the holder, at the time he institutes his suit against the maker, can cause a judgment for the amount due to be entered against the maker under the consent given in the warrant of attorney, and immediately thereafter can have an execution issued under which the sheriff can proceed at once to levy upon the property of the maker. This levy may be the first intimation to the maker that any action has been instituted on the note. Authority contained in an instrument to confess judgment thereon if not paid at maturity does not affect its negotiability. [See, *post,* Appendix A, Negotiable Instruments Law, §24(2).]

Frequently the payment of a negotiable instrument is

secured by the delivery of property, tangible or intangible, to the payee, such as municipal or corporate bonds, certificates of corporate stock, and the like, which is known in financial circles as "collateral," but in law the transaction would constitute a bailment of these articles, and be called a "pledge." (See, *post,* Volume IV.) If the instrument be not paid when due, the holder would be entitled to reimburse himself through these collateral securities, though ordinarily the law might require the observance of certain formalities in disposing of them, such formalities being intended for the benefit of the party who delivered them as security. The instrument, however, might provide for the immediate sale of the collateral without demanding payment from, or giving notice to, the owner, without advertisement, and at private sale, or that the holder of the note might become the purchaser. These provisions usually are valid if the holder of the note acts fairly in taking advantage of them; and they do not affect negotiability of the instrument secured. [See, *post,* Appendix A, Negotiable Instruments Law, §24(1).]

As was said, *ante,* "Elementary Law," §10, the law usually specifies a certain amount of property which is exempt from liability for the owner's debts. Exemptions being given to protect a debtor from hardship, the law usually does not allow him to waive them; for, if he could do so, a debtor, hard pressed, would be compelled to waive them before he could borrow money, making all of his property subject to levy, and thus the law would in effect be nullified. Sometimes the law allows a waiver of these exemptions; and the exact manner in which they must be waived is designated by statute. Whether a waiver of exemptions is valid or not would depend upon the law in each particular State; but, in any event, such a provision does not render an instrument non-negotiable. [See, *post,* Appendix A, Negotiable Instruments Law, §24(3).]

The following is a form of a promissory note containing the provisions just considered:

$1,000.00 Chicago, Ill., July 14, 1917.

Ninety days after date, for value received, I promise to pay to the order of Michigan Avenue Trust Company, of Chicago, One Thousand Dollars, with interest at the rate of seven per cent. per annum from date until paid.

Both principal and interest are payable in the gold coin of the United States of the present Standard of weight and fineness, at such place in the United States as the legal holder hereof may, from time to time in writing appoint; and, until such appointment, at the office of Michigan Avenue Trust Company in Chicago.

HARWOOD FROST.

The undersigned has deposited with said Bank, as collateral security for the payment of the above note, and of every other liability or liabilities, either direct or contingent, now owing or which may hereafter be owing, whether now or hereafter contracted, of the undersigned (including all liabilities of any partnership created while the undersigned may have been a member thereof) to said payee, or to the legal holder thereof, the following property, namely: One Five per cent. Refunding Gold Bond of Peoples Gas Light and Coke Company for One Thousand Dollars; Ten Shares of corporate stock in Commonwealth Edison Company, of Chicago; with the right, on the part of said Bank or of the legal holder hereof, from time to time to call for additional security of such kind and value as will be satisfactory to said Bank or to the legal holder hereof; and, on failure to respond, or if, in the judgment of said Bank or of the legal holder hereof, said security or any additions thereto or substitutes therefor, or any part thereof, shall have depreciated in value, then the whole of the above note shall be deemed immediately payable at the election of said Bank or of the legal holder hereof, with full power in said Bank, or in the legal holder hereof, on maturity thereof either by its terms or by election as aforesaid, or on the non-payment of any of the other liabilities above-mentioned, at any time and from time to time to sell, to assign and to deliver the whole

of said property and all additions thereto and substitutes therefor, or any part of said property, additions and substitutes, at any public or private sale at the option of said Bank or of the legal holder hereof, and without advertising the same and without notice to the undersigned, and with the right of said Bank or of the legal holder hereof, to be a purchaser at any public sale or sales; and, in the event of any sale or purchase hereunder, no matter by or to whom made, all notice thereof, and any and all equity or right of redemption, whether before or after sale hereunder, is hereby expressly waived; and, after deducting all legal and other costs and expenses, including reasonable attorney-fees, from the proceeds of such sale or sales, to apply the remainder on any one or more of said liabilities, whether due or not, as said Bank or the legal holder hereof shall deem proper (making rebate of interest on any demands not matured), and return the surplus, if any, to the undersigned. In event the proceeds of such sale or sales shall not be sufficient, after the payment of all legal costs and expenses incurred, including reasonable attorney-fees, to pay the principal and interest of the above note, the undersigned agrees to pay the deficiency forthwith after such sale, with legal interest. Said Bank or the legal holder hereof, may, at its, his or their discretion, enforce the collection of said security, additions thereto and substitutes therefor, by suit or otherwise, and may surrender, compromise, release, renew, extend, or exchange all or any of the same. It shall not be the duty of said Bank or of the legal holder hereof to take any steps to collect said security or any of it if the same should become due while in the possession of said Bank or of the holder hereof; and said Bank or the holder hereof shall not be liable for any loss resulting from failure or delay in regard to collecting any of said security. Said Bank or the legal holder hereof, is not required to resort to said collateral or to any part thereof, but shall have the right to enforce payment of the above note or of any amount due and unpaid thereon at any time, by any other lawful means. Said Bank or the legal holder hereof is hereby authorized and empowered at any time to apply to the payment of any liability or liabilities, whether the same be due or not, of the undersigned to said Bank or to the legal holder hereof, (including any liability or liabilities of any

partnership created while the undersigned may have been a member thereof), whether the same be due or not, all property, real and personal, of every kind and description, including balances, credits, collections, moneys, drafts, checks, notes, bills, or accounts (whether on hand or in transit) of the undersigned.

HARWOOD FROST.

And to secure the payment of the above note, the undersigned hereby authorizes, irrevocably, any attorney of any Court of Record to appear for the undersigned after maturity, in such court, in term time or in vacation, in any part of the United States or elsewhere, and to confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and fifty dollars attorney-fee, and to waive and release all errors which may intervene in any such proceeding, and consents to immediate execution upon said judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.

HARWOOD FROST.

And to secure the payment of the above note, the undersigned hereby agrees that any judgment obtained thereon shall at once become a first and valid lien on any property belonging to the undersigned, whether the same be exempt from execution by law or not, hereby waiving the benefit or advantage to which the undersigned may be entitled by virtue of any homestead or other exemption law now or hereafter in force in this or in any other State or country where a judgment on the above note may be entered or enforced, hereby ratifying and confirming all that may be done by virtue hereof.

HARWOOD FROST.

Address: 5476 Kenwood Avenue.

Due: October 12, 1917.

The above form has been made somewhat lengthy in order that the various provisions heretofore mentioned may be better understood. It would be possible to make them still longer; but usually all of them do not appear in one instrument. Paragraphs, sentences, clauses or words may be omitted, as seems desirable; but it must be borne in mind

that the language actually used may not be extended to include what does not appear. Thus, authority given to the payee to do certain things, such as to confess judgment, would not necessarily give similar authority to any other holder if the instrument does not state that he is to possess it. A note sometimes authorizes a confession of judgment "at any time hereafter," in which case a judgment might be entered thereon the next day after its delivery, regardless of the time of maturity.

CERTAINTY AS TO AMOUNT.

25. The sum payable is not rendered uncertain because it is to be paid—

With interest;

With exchange; or

With costs of collection or an attorney-fee if not paid when due.

In event of discrepancy between the amount expressed in words and that expressed in figures, the former will govern.

It is evident that an instrument, even though calling for the payment of money alone, cannot perform duty as a circulating medium if the amount due thereon does not definitely appear on its face. [See, *post*, Appendix A, Negotiable Instruments Law, §20(2).] The value of such an instrument would be as uncertain as if it called for the delivery of goods. Thus, an order to pay "all that is due to me for wages" would be uncertain as to the amount and, hence, non-negotiable. There might not be anything due; or, if something were due, there might be a dispute as to the exact amount; and even if there should be an undisputed amount due, and if the payee knew just what the amount was, this would not make the instrument negotiable,

as subsequent holders would have to rely on repeated oral statements as to the amount or else would be under the necessity of making inquiry of the debtor each time a transfer was made—a burden evidently so great as to prevent such an instrument from playing the part of money. In effect it is not much more than an oral contract.

For similar reasons an instrument is non-negotiable if the sum called for be indefinite although a part might be definite. Thus, an order for "twenty-five dollars and whatever further amount is due me" would not be negotiable, as the total sum would be uncertain.

The law, however, has allowed some exceptions, or apparent exceptions, based either on the theory embraced in the Latin maxim, *"Id certum est quod certum reddi potest"* (that is certain which can be rendered certain), or because the additional uncertain amount is not payable at the time the instrument is due but afterwards, and then only in event of non-payment of an amount which is certain.

Instruments calling for the payment of money frequently call for the payment of interest, either from date or after maturity. If the instrument provides for the payment of interest without specifying the date from which it is to be computed, it runs from the date of the instrument, or from its issue if undated. Usually the rate of interest is named in the instrument; but, if not, it would be at the rate fixed by statute in the State where the interest is payable, such rate being known as the "legal" rate. (See, *post,* §101.) In either event the amount due as interest at any time can be easily computed, hence is regarded in law as being definite. [See, *post,* Appendix A, Negotiable Instruments Law, §21(1).] The fact that an instrument may provide for a higher rate after maturity does not impair negotiability, that not making the amount any more indefinite.

Instruments payable in one place sometimes provide for payment "with exchange on" another designated place. Thus, a bill of exchange for $1,000 is payable in Saint Louis, but the payee is in Chicago. It costs something to transfer $1,000 from Saint Louis to Chicago, and this amount is designated as "exchange." If the payee in Chicago has to pay this exchange he actually receives $1,000 less the amount of exchange; hence, if it is the intention that he shall have $1,000 over all expenses, the bill should have called for $1,000 "with exchange on Chicago" which would entitle him to collect $1,000 and the expense of the transfer of the money from Saint Louis to Chicago. The exact amount which will be charged as exchange is not usually specified on the instrument, hence, the total amount actually collectible does not quite definitely appear; yet a provision for the payment of exchange will not alone render an instrument non-negotiable. [See, *post,* Appendix A, Negotiable Instruments Law, §21(4).] The reason for this exception to the general rule requiring certainty as to the amount is that the rates of exchange between various points is so well established that they can be ascertained with little trouble.

Instruments calling for the payment of money sometimes contain a provision that if payment be not made when due, the party liable shall pay the costs of collection, and, if suit be brought on the instrument, shall reimburse the holder for attorney-fees paid by him. Sometimes the amount of such fee is expressly named, sometimes it is a specified percentage of the amount due, and sometimes a "reasonable" fee is designated. Negotiability is not affected by any such provision, as the amount due on the instrument is not made uncertain by reason thereof. [See, *post,* Appendix A, Negotiable Instruments Law, §21(5).] If the instrument be paid when it should be, there is no occasion for recourse to this provision, so that the amount named in the instrument is

all that is called for and that is definite. The provision operates only after the time it was intended to circulate and to be negotiable, so that its use as money during the time it was intended to be used as such is in no way restricted. Provisions of this character aid circulation by enlarging the rights of the holder.

It is customary in most negotiable instruments to indicate the amount called for therein, both by words and figures, the latter sometimes following the former in the body of the instrument, but more commonly being placed in the margin. This may be done for several reasons. The amount is one of the most important items in the contract, and expressing it twice tends to accuracy and makes alteration less easy, and the numerals catch the eye more readily than words. Sometimes there is a discrepancy between the words and the numerals, in which case the words will govern (see, *ante,* "Contracts," §66), as, undoubtedly, there is less probability of error in words than in figures. If, however, the words are ambiguous or uncertain, reference may be had to the figures to fix the amount. [See, *post,* Appendix A, Negotiable Instruments Law, §36(1).] Good business would prompt a person, before accepting an instrument which is ambiguous or uncertain, to make inquiry, if possible, from the party liable thereon, for the purpose of ascertaining what he intended, and thus avoid possible inconvenience in the future.

CONDITIONS.

26. Any condition or contingency in an instrument which, on its face, raises a doubt whether payment can be demanded, makes it non-negotiable.

A bill of exchange designating a fund from which payment is to be made is not negotiable.

Money would be of little use as a circulating medium, although definite as to amount, if there should be a reasonable doubt whether there is any actual liability on it. The same principle applies to instruments issued by private persons which are intended to circulate as money. [See, *post,* Appendix A, Negotiable Instruments Law, §20(2).] Anything on the face of an instrument which shows that conditions or contingencies make it doubtful whether payment ever can be demanded evidently would make it valueless as money. Thus a note payable ten days after the maker should marry would not be negotiable even though the maker were engaged to marry an heiress, as the marriage is not absolutely certain, and if he should not marry, nothing would be due. A person accepting such an instrument simply takes a chance, and chances are too indefinite to form a circulating medium. Likewise a promise to pay "four years after date if I am then living" annexes a contingency. The death of the maker before the day of maturity would prevent anything being collected from his estate, and such uncertainty would prevent the note from being negotiable.

A bill of exchange designating a fund from which payment is to be made and restricting payment to such fund is not negotiable, as the bill would not be payable if the drawee did not possess such a fund. (See, *post,* Appendix A, Negotiable Instruments Law, §22.) Thus an order upon the drawee to pay a certain sum "out of rents collected by you" would not be negotiable, as payment is made contingent on the drawee having collected rents.

However, a mere designation of a fund from which the drawee can reimburse himself, or of a particular account to be debited with the amount, will not alone prevent a bill of exchange from being negotiable if it be an absolute order. [See, *post,* Appendix A, Negotiable Instruments Law.

§22(1).] Thus, an order to pay a certain sum and "charge same to rents collected by you" would be negotiable, as payment is not dependent on rents having been collected or limited to the amount which may have been collected. The drawee is expected to pay the bill in any event. If there should be a doubt whether the drawee is limited to a designated fund or not, the courts presume that the drawee is not restricted, hence the instrument is negotiable.

A statement of the transaction which gives rise to the instrument does not make it non-negotiable [see, *post,* Appendix A, Negotiable Instruments Law, §22(2); see, also, Appendix B, Case No. 3], unless the statement introduces matters which prevent negotiability. Thus, a statement in a promissory note that it was given for goods sold by the payee to the maker, title to which is to remain in the payee until the note is paid, will not prevent negotiability, as it merely recites the consideration and provides security for payment; but a statement that a note is "subject to conditions of hotel purchase contract" would make it non-negotiable, for although the note indicates that it was given as the result of some prior contract, it further indicates that there are conditions, though not named, which may make payment uncertain, thus raising a doubt whether any payment at all can be demanded.

The rule that a condition or contingency renders an instrument non-negotiable is not affected by the fact that the condition may have been performed or the contingency may have happened, and that the holder might have been aware of the fact before he acquired the instrument. (See, *post,* Appendix A, Negotiable Instruments Law, §23.) An instrument must show on its face that the payment is not subject to any condition or contingency, so that when a transfer thereof is made, any transferee need not be compelled to make inquiry to ascertain whether the condition has

been performed or the contingency has happened. If the transferee has no time or facilities for an investigation he takes a chance. Thus, in the above illustrations, the note does not become negotiable by reason of the subsequent marriage of the maker, nor does the bill of exchange become negotiable by showing that the drawee actually has sufficient rents collected and will pay the bill. These facts, although known to many, might not be known to all, and the doubt which might exist in the mind of anyone would seriously interfere with the use of the instrument as a circulating medium. As was said, *ante*, §8, an instrument originally non-negotiable remains so; and in §22, a negotiable instrument must not depend on oral evidence.

The fact that a party may be financially unable to meet his obligation when due is not a contingency which affects its negotiability. It is similar to a possibility that the government may not meet its obligations. The responsibility of the parties is a matter which each person taking an instrument must decide for himself. Practically, any instrument known to lack parties financially responsible would not circulate very rapidly though negotiable.

Conditions whose performance is entirely within the control of the holder of an instrument do not make it non-negotiable, as it is in his power to enforce it. A condition of this character is mentioned, *post*, in §28.

CERTAINTY AS TO TIME OF PAYMENT.

27. Time of payment is regarded as certain if it is bound to arrive sometime, although the exact time may be uncertain.

From what has been said thus far it will be noticed that certainty is one of the leading requisites of negotiability;

and that doubt, on the other hand, is a hindrance to negotiability. The time of payment must be certain to arrive. The law, however, does not require that the exact time shall be definitely known; though, as has been seen in the preceding section, an instrument designating a time of payment which never may arrive becomes contingent and, hence, is not capable of taking the important part of money. On the point of certainty as to the time of payment the courts have been most liberal—in fact have gone to an extreme seemingly inconsistent with the requirement of certainty, holding instruments to be negotiable although their exact time of payment is actually so uncertain and may be so remote that it is difficult to see how such instruments could play the part of money. This matter the law leaves to the person receiving the instrument. Practically, doubts as to the exact time of payment of an instrument might interfere with its circulation.

The rule is that if a time of payment is certain to arrive, however remote it may be, the instrument is negotiable; it is only when there is a doubt whether the time ever will arrive that the instrument becomes non-negotiable by reason of uncertainty as to the time of payment. Thus, a note payable ten days after the death of the maker's father would be negotiable [see, *post*, Appendix A, Negotiable Instruments Law, §23(3)]; while a note payable one month after the completion of a designated building would be too uncertain to make it negotiable. While everyone must die, work begun may never reach completion. Death is certain; human action is uncertain.

There is no limit fixed by law to the time within which a negotiable instrument must be payable provided it is certain to arrive. That point is left to the agreement of the parties.

PAYMENT IN INSTALLMENTS.

28. An instrument is not rendered non-negotiable by reason of a provision therein for its payment by stated installments; or by a further provision that, upon default in payment of any installment, whether of principal or of interest, the whole shall at once become due.

Frequently notes provide for the payment of interest or of the principal or of both in installments, with a provision that, upon failure to pay any installment as provided, the whole amount shall become due at once at the option of the holder. Such instruments are not made non-negotiable by reason of such a provision although the time of payment, in one sense, is made conditional and uncertain. [See, *post*, Appendix A, Negotiable Instruments Law, §21(2)(3).] The time provided for ultimate payment being definite, a person taking the instrument would be guided by that. The provision accelerating the time of payment cannot take effect unless the party liable does not perform his contract; and such provision being for the benefit of the holder, will aid and not impede circulation. Default in paying an installment does not of itself change the time of payment; the holder must take some steps indicating the exercise of his right to demand the whole sum at once, and he may wait, if he wish, until the time for paying the last installment arrives.

Installment notes may take different forms. One form is as follows:

$1,000.00 Houston, Texas, September 1, 1917.

At the dates hereinafter mentioned, I promise to pay to Jessie E. McManigal or order, One Thousand Dollars in installments as follows: one hundred dollars on the first day of October, 1917, and a further sum of one hundred dollars on the first day of each and every succeeding month until the full

principal sum of one thousand dollars is paid. Each installment shall bear interest at the rate of six per cent. per annum after date, the interest on each installment being payable when such installment is due. On default of any of the above payments in full, the whole amount of this note shall at once become due at the option of the legal holder thereof. If any installment is not paid in full when due, and the note is placed in the hands of an attorney for collection at any time, I agree to pay, in addition to any amount then due, whether under the terms of this note or through the exercise by the holder of his option to declare the whole sum due, a further sum as an attorney-fee equal to five per cent. of the total amount then due.

JAMES A. DROMGOOLE.

Another form of installment note specifies the exact dates of payment of each installment and the amount thereof; which would be a more convenient method if the amounts were unequal or the times of payment were at irregular intervals. Sometimes interest on the entire unpaid balance is made payable at the time of payment of each installment. These matters depend upon the agreement of the parties.

Where an instrument provides for the payment of interest from its date without any provision when interest is to be paid, the interest is not payable until the principal is due. Thus, if a note for $1,000, payable five years from its date, provides for interest at five per cent. per annum after its date, $1,250 would be due at maturity and nothing could be collected prior to that time. Hence, it is quite customary, in such instruments, to insert a provision for interest to be payable annually, semi-annually, quarterly, or even more frequently; and further to provide that in case of default as to any installment or installments of interest, or if such default continue for a designated time, the principal sum shall at once become due and payable at the option of the holder. Sometimes coupons are made for each installment of interest due on a promissory note. These coupons

themselves may be in the form of negotiable promissory notes, usually reciting that they represent installments of interest. A form for an interest coupon note is as follows:

$60.00 Chicago, Ill., July 14, 1917.

For Value Received, six months after date I promise to pay to the order of *John P. Hunt* the sum of Sixty Dollars at his office in Chicago with interest after maturity at the rate of seven per cent. per annum, being for an installment of interest due that day upon my principal note of even date herewith payable to the order of John P. Hunt five years after its date for the sum of $1,000.00.

EUGENE E. GOLLER.

No. 1. Due: January 14, 1918.

Where coupon interest notes are given, it is customary to state, in the principal note after the provision for interest, that such interest is payable in installments at designated periods, "which several installments of interest, until the maturity of said principal sum, are further evidenced by my interest notes or coupons of even date herewith, with interest after due."

PAYMENT ON DEMAND.

29. An instrument payable on demand or after sight is certain as to time.

An instrument is payable on demand:

When it so expressly states.

When it uses any other term having a similar meaning.

When a time of payment is not expressed.

An instrument is payable on demand as regards anyone becoming liable thereon after it is overdue.

Instruments frequently are made payable "on demand," "at sight," "on presentation," "when called for," or using

some similar term meaning that the holder has the right to require payment at any time he desires it. "Sight" means when the party to make payment sees the instrument, that is, when the holder presents it. Thus, if a bill of exchange be made payable "thirty days after sight," the thirty days begin to run when the holder presents the bill to the drawee for his inspection. Every instrument in effect payable on demand or after sight is, in one sense, indefinite as to the time of payment, as it is not certain when the holder will present it; but as the holder has it entirely in his power to make the time certain and, hence, can make his calculations accordingly, the ability of such instruments to play the part of money is not interfered with and they are negotiable. [See, *post,* Appendix A, Negotiable Instruments Law, §20(3), §23(1).]

If a time of payment is not designated in an instrument at all, the law implies that the parties intended payment at some time, and having failed to designate a particular time, such an instrument is payable on demand. [See, *post,* Appendix A, Negotiable Instruments Law, §26(2). See, also, Appendix B, Case No. 24.]

A negotiable instrument is not always paid or even presented for payment when due; and it is not uncommon for some action to be taken in regard to such an overdue instrument. Thus, a note past due and unpaid might be transferred, or a bill of exchange might be presented to the drawee for acceptance after the expiration of the time named therein for payment. In these cases the instrument as to the transferror or as to the drawee promising to pay it, is treated as an instrument payable on demand, as payment can be rightfully required by the holder at any time. (See, *post,* Appendix A, Negotiable Instruments Law, § 26.)

PAYMENT ON OR BEFORE A DETERMINABLE TIME.

30. An instrument is not rendered non-negotiable by a provision therein giving the party liable thereon an option to make payment before the time designated for payment.

Instruments frequently provide for payment "on or before" a designated time, this giving the party liable thereon an option to make payment at any time before maturity, though payment cannot be demanded by the holder until the expiration of the time named. Such a provision does not interfere with negotiability, although, in one sense, the time of payment is rendered uncertain thereby. [See, *post,* Appendix A, Negotiable Instruments Law, §23(2).]

CERTAINTY AS TO PARTIES.

31. A party who signs his name, even though assumed, is sufficiently designated.

Generally, a person whose name is not signed is not liable on an instrument.

An agent signing an instrument is personally liable unless he adds words indicating that he signs for or on behalf of a principal.

An instrument may be negotiable though payable to—

Two or more jointly.

One or some of several payees.

One of the other parties to the instrument, as to the maker, to the drawer, or to the drawee.

The payee is sufficiently designated by describing him as—

The holder of an office.

Bearer.

An instrument made payable to the fiscal officer of a bank or corporation is prima facie payable to such bank or corporation.

An instrument is payable to bearer when—

Payable to the order of a fictitious or non-existing person and known to be such to the person making it so payable.

The name of the payee does not purport to be the name of any person.

An error in a name of a party does not make such party uncertain.

A bill of exchange is negotiable though—

Addressed to two or more drawees jointly; but not if in the alternative or in succession.

Designating the drawee by description.

To make an instrument negotiable the parties must be designated with reasonable certainty so as to indicate who can be held liable thereon and also who is entitled to enforce such liability (see, *post,* Appendix A, Negotiable Instruments Law, §27); otherwise the instrument could not play the important part of money.

Any party who has signed his name as such is sufficiently designated; and, as was said, *ante,* in §22, the law is very liberal as to signatures. A person signing an assumed name will be bound to the same extent as if he had signed his right name. (See, *post,* Appendix A, Negotiable Instruments Law, §37.)

Generally a person is not liable on an instrument unless his signature appears thereon (see, *post,* Appendix A, Negotiable Instruments Law, §37); hence an agent should be particularly careful how he signs a negotiable instrument if he wishes not to incur personal liability. (See, *ante,* "Agency," Illustrative Case No. 2.) The proper method is for him to sign his principal's name "by" or "per" his own name and describing himself as agent or the capacity in which he acts, though any form is sufficient if the wording clearly indicates who is the principal and that the person

affixing the signature is acting merely as agent for such principal or in a representative capacity. An agent signing his own name and describing himself as an agent, but without mentioning his principal's name, will bind himself personally, and his principal will not be bound at all on the instrument although the name of the principal is known and the agent intended to bind him. (See, *post,* Appendix A. Negotiable Instruments Law, §39.) "Agent" in these cases is regarded as descriptive merely, identifying the signer just as if the word "grocer" had followed the name of the signer. This results from the general rule that all the terms of a negotiable instrument must appear on its face so that no one will be compelled to make inquiry in regard thereto. Even where the name of the principal appears followed by the agent's name, the agent may be liable if he has not made it clear that he is signing merely as agent. Thus, a note began, "We promise to pay," and was signed, "Dubuque Mattress Co., John Kapp, Pt." Kapp contended that "Pt." meant "president," and that he signed merely as the agent of the corporation; but he was held personally liable as a joint maker of the note. He should have prefixed "by" to his signature; or the note should have begun, "Dubuque Mattress Company promises to pay." However, the mere fact that the name of a corporation appears at the top or in the margin of an instrument does not make the corporation liable thereon though the officer signing may have added his title to the signature. (See Appendix B, Case No. 4.)

The following forms have been held sufficient to bind the principal and not the agent: *"A.B.* by *X.Y.,* agent"; *"A.B.* by his agent *X.Y."; "A.B. per X.Y."; "*By authority of *A.B., X.Y."; "X.Y.* on behalf of *A.B."; "X.Y.,* agent *for A.B."; "X.Y. for A.B."; or* the name of the principal, *"A.B.",* written by the agent without the name of the agent appearing. The latter forms, though legal, are not good business.

The following forms have been held to bind the agent alone and not his principal: "*X.Y.*, agent"; "*X.Y.*, agent of *A.B.*"; "*X.Y.*, treasurer," etc.; "*X.Y.*, President of *A.B.* Company."

Where an agent signs in a proper manner, the principal alone is liable if the agent acted within the scope of his authority. (See, *ante*, "Agency," §54.) If the agent did not have any express or implied authority to sign the principal's name, no one is liable on the instrument. The principal would not be, from lack of such authority; and the agent would not be, although he knew he did not possess authority, as he has not indicated any intention of making himself a party. While it is true that a person who holds himself out as having authority to represent another when he does not have such authority, whether he acts on good faith or fraudulently, is liable on an implied warranty to the person who deals with him, this does not make the agent liable on the contract itself; though in effect the extent of his liability on the implied warranty might be the same as that on the contract.

No particular form for the appointment of an agent to sign a negotiable instrument is required; and such authority may be established as in other cases of agency. (See, *post*, Appendix A, Negotiable Instruments Law, §38.) A signature of an agent "by procuration" (usually abbreviated to "*per proc.*") is notice that the agent has but a limited authority (see, *ante*, "Agency," §33), and the principal is not bound if such agent exceeds the limits of his authority. (See, *post*, Appendix A, Negotiable Instruments Law, §40.)

Officers of the government are not held as strictly as other agents are, as everyone having dealings with a public officer is presumed to know the limitations upon his authority and that he intends not to bind himself by an innocent mistake as to the law.

Negotiability of an instrument is not prevented by the fact that it is made payable to two or more jointly; or to one

or some of several payees; or because the payee is also one of the other parties to the instrument, such as the maker of a note, or the drawer or the drawee of a bill of exchange. (See, *post,* Appendix A, Negotiable Instruments Law, §27.)

Although negotiability requires certainty as to the payee, he will be regarded as sufficiently indicated if his identity can be ascertained at any time. Thus the payee may be described as the holder of an office for the time being, as "the trustees under the will of Clement M. Hunt or their successors." [See, *post,* Appendix A, Negotiable Instruments Law, §27(6).]

An instrument made payable to a person as the fiscal officer of a bank or corporation, such as "cashier," is deemed *prima facie* to be payable to the bank or corporation of which he is such officer. (See, *post,* Appendix A, Negotiable Instruments Law, §72.)

Instruments frequently are made payable to "bearer" (see, *ante,* §15), which likewise is sufficiently certain. [See, *post,* Appendix A, Negotiable Instruments Law, §28(1).] In some cases an instrument is regarded as payable to bearer although that word may not have been used. If an instrument is knowingly made payable to a fictitious or non-existent person it may be treated as if made payable to "bearer." [See, *post,* Appendix A, Negotiable Instruments Law, §28(3); see, also, Appendix B, Case No. 5.] Thus where a bill of exchange was made payable to "J. White," and the drawer did not intend to designate any particular person and this was known to the drawee, the bill was held to pass as if drawn payable to "bearer." If, however, the party designating a fictitious or non-existent person as payee, such as a corporation not yet formed, supposed there was such a person, the instrument cannot be treated as payable to bearer; and as there was no such party, a contract would not result. If the name of the payee does not purport to be

the name of any person, the instrument is likewise treated as if made payable to bearer. [See, *post,* Appendix A, Negotiable Instruments Law, §28(4).] Thus, checks frequently are made payable to "cash" or to "currency"; which is equivalent to making them payable to bearer.

An error in the name of a party will not affect the rights of such party. Thus an instrument made payable to "Elizabeth Willison" and delivered to and intended for Elizabeth Willis, would not affect the rights of the latter. (See, *post,* Appendix A, Negotiable Instruments Law, §73.) At the most it would cause some trouble in the way of explanation. (See, post, §47.)

If a drawee be not specified in an instrument worded as a bill of exchange, or is not indicated with reasonable certainty it is not negotiable [see, *post,* Appendix A, Negotiable Instruments Law, §20(5)]; and while a bill of exchange may be addressed to two or more drawees jointly, it is not negotiable if addressed to two or more in the alternative or in succession. (See, *post,* Appendix A, Negotiable Instruments Law, §212.) The drawee, however, is regarded as sufficiently designated if he can be identified from the description given, as "Steamer *C. W. Dorrance* and owners."

WORDS OF NEGOTIABILITY.

32. To be negotiable an instrument must be made payable to order or to bearer, or must use some other term clearly having a similar meaning.

Negotiability originally resulted from the intention of the parties. This intention was indicated in the instrument either by making it payable to "bearer," showing that payment could be made to anyone who might be in possession

of it (see, *ante,* §15); or if a payee were designated specifically, by directing payment to be made to his order (see, *post,* Appendix A, Negotiable Instruments Law, §27), that is, the payee named might direct payment to be made to someone else. The most common form is, "pay to the order of *A.*" Other common forms are, "pay *A* or order," and "pay *A* or bearer." [See, *post,* Appendix A, Negotiable Instruments Law, §20(4).] The last form is equivalent to making the instrument payable to bearer, just the same as if the payee's name had been omitted. [See, *post,* Appendix A, Negotiable Instruments Law, §28(2).]

The law allows the substitution of an equivalent for "order" or "bearer." Thus, the expressions, "pay *A* or holder," "pay *A* or his assigns," "pay *A*" with the words "this is negotiable" inserted in the instrument, have each been held to render the instrument negotiable. (See, *post,* Appendix A, Negotiable Instruments Law, §29.) It is, of course, advisable not to depart from the recognized forms.

Technically there is a slight distinction between forms apparently the same, such as "bearer" and "the bearer," the former meaning anyone in possession of the instrument, while the latter refers to a particular person—the one to whom the instrument was delivered. Thus, a man writing an order for money addressed to his debtor directs payment to be made to "the bearer," as he is sending the order by a servant known by his debtor to be a servant, although the debtor does not know the servant's name, and would not recognize it if it had been inserted. "The bearer," in this case, means "this particular bearer"; and it has been held that such an instrument is not negotiable. There is also a little distinction sometimes made between "*A* or order" and "to the order of *A.*" Under the former, payment could be made to *A* upon mere presentment by *A;* under the latter *A* would not be entitled to payment unless he by indorsement ordered payment to be made to himself or to bearer.

INARTIFICIAL INSTRUMENTS.

33. The negotiability of a writing possessing all the necessary elements is not affected by the fact that it is inartificially drawn.

From what has been said thus far, it will be noticed that, in some respects, the law is exceedingly technical as to the requirements of negotiability; but if all the essential elements are present, the law does not insist on any further formality. (See, *post,* §36.) Any language is sufficient if clear, as has been shown by some of the illustrations heretofore given. (See, *post,* Appendix A, Negotiable Instruments Law, §29.)

NON-NEGOTIABLE INSTRUMENTS ASSIGNABLE.

34. Although an instrument, owing to lack of some of the requisites above mentioned, may not be negotiable, it may nevertheless be assigned; and the assignee can enforce it if it is a valid and enforceable contract.

It must be borne in mind that when the requisites of negotiability are discussed, the chief point involved is whether a transferee can enforce the instrument although some prior holder might not have been able to do so. (See, *ante,* §5.) It does not by any means follow that an instrument which is non-negotiable may not be transferred and give rights to the transferee. All that is meant is that it cannot be transferred free from any existing defenses to it, and, hence, cannot take the part of money. Most of the non-negotiable instruments mentioned in the illustrations heretofore given were assignable; and, in the absence of a sufficient legal reason why they should not be paid by the person who signed them, their payment could be enforced by an assignee. The

difficulty was that in these particular cases there were sufficient legal reasons why the signers did not want to pay. Thus, if *A* should promise to pay *X* "twenty dollars in goods, one year after date if I am then alive," the instrument would be non-negotiable because, first, it is not payable in money, (see, *ante,* §23), and, second, because payment is contingent on the continued existence of the maker. (See, *ante,* §§26, 27.) However, if *X* should assign the instrument to *Y,* and *A* should be alive one year after its date, and *A* did not have any legal reason why his promise should not be performed, *Y* could compel the delivery of the goods by *A,* or obtain damages for their non-delivery; but if *A* could prove that *X* obtained this promise by fraud, by duress, or without consideration, so that X could not enforce it, *Y* could not enforce it although he paid *X* twenty dollars for the instrument and was in ignorance of the fraud or of whatever might constitute *A*'s defense. If the instrument had been negotiable—had promised absolutely to pay "twenty dollars one year after date," it would have been otherwise, and *Y,* in such a case, could compel *A* to make payment although the instrument had been obtained by *X* through fraud, or through duress, or although the consideration might have failed, so that *A* could not have been compelled to pay *X* if the latter had retained the note. (See, *post,* §81.) However, as has been stated, there are some rights which are not even assignable; as where the personal element is involved. (See, *ante,* "Contracts," §72.) It must also be borne in mind that under the common law, an assignee must bring suit in the name of the former creditor, and must show his right to recover anything; while the holder of a negotiable instrument brings suit in his own name and the party sued must show, if he can, why recovery should not be allowed.

QUASI-NEGOTIABILITY.

35. A few instruments, though not negotiable, can be transferred so as to give a transferee some of the privileges attaching to a negotiable instrument, if such was the intention of the parties.

There are a few documents which do not possess all the elements of negotiability, yet are issued by the parties with the understanding that they may pass from hand to hand; and the law, giving effect to the intention of the parties, does not subject such instruments to all the restrictions governing assignability, but allows the transferee to exercise some of the privileges attaching to negotiability, such as bringing an action in his own name. The most common documents of this character are bills of lading issued by carriers when goods are received for transportation, and warehouse-receipts issued on the receipt of commodities by a bailee. If it is the intention that such a document may be transferred and there is no valid defense to it, a transferee will have the right to enforce it very much as if it had originally been issued to him; and in some States such instruments are made negotiable by statute. Instruments of this character, occupying a position intermediate between a negotiable contract and an assignable claim, are sometimes called "negotiable documents of title" though they are more commonly designated as "quasi negotiable" instruments. They are not within the scope of the present subject. Some treatment has been given to them, *ante,* in "Sales," §44; and they will be further discussed, *post,* under "Bailments and Carriers," in volume IV.

DATE—PLACE—CONSIDERATION—SEAL.

36. An instrument is not invalid or non-negotiable merely because it—

Is not dated.
Is incorrectly dated.
Does not specify the place where executed.
Does not specify the place where payable.
Does not specify that it was given for value received.
States the consideration.
Bears a seal.

Where an undated instrument is payable at a fixed period after date, any holder may insert the date of its issue; but if an incorrect date be inserted, subsequent holders for value without notice can regard it as the true one.

If an instrument bear a date it is deemed prima facie to be correct.

An antedated instrument is one bearing a date which is prior to the date of actual issue.

A postdated instrument is one bearing a date which is subsequent to the date of actual issue.

An antedated or a postdated instrument, whether the result of intention or of inadvertence, is not invalid by reason of the incorrect date; and the true date can be shown if important and the rights of others are not prejudiced.

The validity or negotiability of an instrument is not prevented because it is not dated [see, *post,* Appendix A, Negotiable Instruments Law, §25(1)], though absence of a date might practically interfere with its circulation, especially if the time of payment must be determined therefrom. Thus, an undated instrument payable "one year after date" does not indicate when it would be due. In such a case, the date of its delivery would be its date [see, *post,* Appendix A, Negotiable Instruments Law, §36(3)], which any holder

has the right to insert. If he insert an incorrect date, subsequent holders who have acquired the instrument for value and in good faith can regard such date as the true one (see, *post,* Appendix A, Negotiable Instruments Law, §32), as they, rather than the party who issued it in an imperfect condition, should be protected.

If an instrument bear a date, it is immaterial where it appears thereon, though usually in the upper righthand corner, and such date is deemed *prima facie* to be correct (see, *post,* Appendix A, Negotiable Instruments Law, §30), whether the instrument is antedated or postdated. Antedating an instrument is writing a date thereon which is prior to the time of the execution of the instrument; postdating is writing a date which has not arrived at the time of the delivery of the instrument. There is nothing wrong in this if not resorted to for the purpose of evading some rule of law (see, *post,* §81, "Illegality"), even though, on the date named, some of the parties were infants, or have become insane or are dead, as the party to whom such an instrument is delivered acquires title thereto at the date of delivery. (See, *post,* Appendix A, Negotiable Instruments Law, §31.) It can be shown orally that the date named is not correct, providing there is a good reason for so showing and the rights of others will not be affected. Thus, the maker of a promissory note might show, as against the payee or one having notice, that it was antedated in order that the time elapsing between its issue and the time of its payment might appear to be longer and thus call for an amount of interest which would be usurious for the time actually elapsing between the execution of the note and the time of payment.

Neither a statement of the place of date nor of a place of payment is requisite to make an instrument negotiable. [See, *post,* Appendix A, Negotiable Instruments Law,

§25(3).] A statement of the place of date, which usually precedes the date, is desirable, as it impliedly becomes the place of payment in the absence of any place of payment being expressly designated (see, *post,* §86), and because it indicates by what law the validity of the instrument is to be determined, the manner of its transfer is to be governed, and where subsequent acts in regard to the instrument are to take place, such as sending notices, as the place of date may be presumed to be the place of residence or the place of business of the parties liable thereon, in the absence of knowledge to the contrary. (See, *post,* §94.)

It is a popular error that a negotiable instrument must state that it was issued "for value received." This is not essential, nor is any equivalent expression required, a negotiable instrument being presumed to have been given originally for a valuable consideration until the contrary be shown (see, *post,* Appendix A, Negotiable Instruments Law, §50; see, also, Appendix B, Case No. 34), and, as will be seen *post,* in §81, this presumption is conclusive as to subsequent holders for value without notice, evidence of want of consideration not being allowed. It is customary, however, to use this expression, the instrument then showing on its face that there was a consideration; but if there actually was no consideration, and the case is one in which the law allows such a defense to be made, the written acknowledgment of a consideration can be disproved by oral evidence. Not only is consideration presumed for the original issue of a negotiable instrument, but a consideration is presumed for each subsequent transfer thereof, such presumption likewise being *prima facie* only as between the parties to each transfer, becoming conclusive in favor of subsequent holders for value without notice. (See, *post,* §81.)

It is very desirable for a non-negotiable instrument to state that it was given "for value received," or to show a consideration in some way, as the law does not presume any consideration for such instruments in the absence of any indication thereof appearing on the instrument itself; but if the instrument states a consideration it will be presumed to be correct until the contrary has been shown, which can be done as against any party. Probably this accounts for the popular error abovementioned.

An instrument sometimes shows the transaction out of which it originated, but this alone, unless there is some statute providing otherwise, will not make it non-negotiable [see, *post,* Appendix A, Negotiable Instruments Law, §22(2); see, also, Appendix B, Case No. 3], although the possibility of a failure of consideration or of a counterclaim might be indicated. Thus, a statement in a promissory note that it was given for a sewing-machine warranted for one year from date would not interfere with negotiability although part of the consideration for the note was the warranty, a breach of which might subsequently give the maker a right to a counterclaim. (See, *ante,* "Sales," §60.) In this case the warranty was complete at the time it was given, and the law does not indulge the presumption that it will be broken (see, *post,* §75); but if the note had promised payment one year after date if the warranty had not been broken, the instrument then would have been conditional and, hence, non-negotiable under the rule stated, *ante,* in §26.

Under the modern law the old common law distinction between a contract under seal and a simple contract is of little or no importance (see, *ante,* "Contracts," §5), so that now an instrument, otherwise negotiable, does not become non-negotiable by the addition of a seal. [See, *post,* Appendix A, Negotiable Instruments Law, §25(4).]

From all that has been said in this chapter it will be seen that the following instrument is negotiable:

I promis to pay bearer one hundred dollars

ARTHUR S. PEEBLES.

Although undated and inartificial it has all the elements of negotiability (see, *ante,* §21), being in writing and signed (see, *ante,* §22), and calling unconditionally for the payment of a certain sum in money. (See, *ante,* §§23, 25, 26.) It is regarded as being definite as to the time of payment (see, *ante,* §27), and as to the parties (see, *ante,* §31), and has words of negotiability. (See, *ante,* §32.)

CHAPTER III.

ACCEPTANCE OF BILLS OF EXCHANGE.

37. Definition—Effect.
38. Time—Kinds—Form.
39. General and Qualified.
40. Constructive.
41. Separate Paper—Requirements.
42. Who May Accept.
43. Admissions of Acceptor.

DEFINITION—EFFECT.

37. Acceptance is an agreement by the drawee of a bill of exchange to pay it.

After such agreement, the instrument itself is frequently designated as an "acceptance."

Acceptance of a bill of exchange by the drawee named therein at once makes him primarily liable as to the drawer, to the payee, and to each subsequent holder.

In a bill of exchange three persons usually are named instead of two as in the case of a promissory note. (See, *ante,* §15.) The person who signs a bill of exchange—the drawer, does not, in express terms, promise to pay it, though in some cases he may be required to do so under an implied contract. (See, *ante,* §19; and, *post,* Chapter VI.) It is addressed to a third person—the drawee, who is ordered by the drawer to make payment to a person designated therein —the payee. (See, *ante,* §9.) It is a rule of law that a person cannot be made a party to a contract without his consent, otherwise one of the essential elements of a contract, that of agreement, would be lacking. (See, *ante,*

"Contracts," §§9, 70.) Suppose *A* has lent $1,000 to *X* which is due and unpaid. *A*, wishing to pay *M* $1,000, gives him an order on *X* for that amount, that is, draws a bill of exchange on *X* in which *M* is named as payee. Although *A* would have a right to assign his claim against *X* to *M*, and *X* after notice of the assignment could be required to make payment to *M*, a contract does not exist between *X* and *M*.

When *A* gives *M* a negotiable bill of exchange on *X*, it does not operate as an assignment of the claim, and there is nothing which *A* or *M* can do to make *X* liable on that bill of exchange without his consent. (See, *post*, Appendix *A*, Negotiable Instruments Law, §211.) *A* has made an offer to *X* by which the latter can become a party to a written contract and, by paying *M*, can terminate the liability of *X* to *A*. *X* is at liberty to accept this offer or not, and to accept the legal obligation of performing its terms. If he does accept it a contract at once results. His act is technically known as "acceptance"; and thereafter he is designated as the "acceptor" instead of the "drawee." He has become the party liable for the payment of the instrument, very much as if he had given his promissory note to *M* at the request of *A*. He has accepted the primary liability on the instrument. (See, *post*, Appendix A, Negotiable Instruments Law, §112.) Even if the drawee did not owe or have any funds of the drawer, acceptance by the drawee would make him primarily liable on the bill so far as holder is concerned. Other parties are not concerned with the financial relations of the drawer and drawee.

If there was a prior contract between the drawer and the drawee that the latter would accept bills of exchange drawn on him, this contract, if oral or if written and not known to third persons, would not constitute acceptance (see, *post*, §38), or give the payee any rights against the drawee, though a breach of such prior contract by a refusal to accept

would give the drawer a right of action against the drawee; or if the agreement to accept was based on an indebtedness of the drawee to the drawer, the drawee's refusal to accept would give the drawer a right to resort to his former cause of action.

If a bill of exchange be paid at the time it is first presented to the drawee, such payment would, in one sense, constitute an acceptance of the offer, so that acceptance would be given, a contract made and a discharge of such contract occur at the same instant; but acceptance as used in this chapter relates only to promises by a drawee to pay in the future. Thus, if a bill of exchange be payable "thirty days after date," the holder might wish to know whether the drawee could be relied upon to make payment when the time of payment arrived, so that the holder can make his financial arrangements with some degree of certainty. It might be that, as between the drawer and the drawee, the latter is the only one financially responsible, and the holder might be in doubt whether the drawer had a right to draw the bill, so that the drawee's agreement to pay it would give a practical validity to the instrument which it did not possess before. The law does not compel the holder to wait until the day of payment to ascertain such practical validity, but he has the privilege of presenting the bill for acceptance at any time.

If a bill of exchange be drawn in sets of two or more (see *ante,* §13), the drawee should accept but one part; if he accepts two or more parts which then come into the possession of different holders for value and in good faith, the acceptor would be liable upon each part that he accepted. (See, *post,* Appendix A, Negotiable Instruments Law, §313.)

After a bill of exchange has been accepted by the drawee, it frequently is referred to as an "acceptance," this indicating briefly that the instrument is a bill of exchange whose payment has been promised by the drawee.

Before acceptance a bill of exchange is, as between the drawer and the payee, a contract whose leading terms are all implied. Under these implied terms the drawer makes a promise to pay which, although conditional (see, *ante*, §19), is the only promise there is, hence, before acceptance, the drawer's liability is primary; but immediately upon acceptance, the drawee, thereafter designated as the acceptor, makes an express promise of absolute payment, becoming thereby the party primarily liable—the one who can be expected to discharge the instrument and whose ultimate payment will terminate the liability of all parties. (See, *post*, §99.) Hence after acceptance, the liability of the drawer shifts from primary to secondary—he is liable only in event the acceptor does not pay. A subsequently accepted bill of exchange might be described by the paradoxical statement that it is a promissory note of the drawee which has been transferred before it is made. This will be better seen from an illustration. Suppose *X* owes *A* $100, and *A* owes *M* a like sum. If *A* holds a promissory note signed by *X* promising to pay *A*, thirty days after its date, the $100 owing by *X*, *A* could transfer this note by indorsement to *M* in order to pay him; but *A* does not have such a promissory note nor any negotiable contract evidencing the indebtedness of *X* to him, so *A* draws an order on *X* to pay *M* $100 thirty days after date. If *X* accepts this order or bill of exchange, the positions of *A*, *M* and *X* will then be the same as if *A* had held and indorsed *X*'s note to *M*. Before acceptance *A* owed *M*; after acceptance, *A*'s liability to *M* is not fully discharged, but *A*'s liability is made conditional and secondary—*A* is not liable to *M* unless *X* should fail to pay the bill as he has agreed to do.

By acceptance of a negotiable bill of exchange, the drawee not only enters into a contract to pay the holder who presents it for acceptance, but makes a similar promise

to each future holder to whom it may be transferred. The payee might transfer the bill before acceptance, in which case the holder would have the right to present it for acceptance. (See, *post,* §85.) An acceptor not only promises to pay the party who may be the holder at or after the date designated in the bill for payment, but he makes an implied promise to reimburse the drawer, and, if the instrument has been transferred, he makes a similar promise to reimburse the payee and each subsequent party, if compelled to pay any party entitled to payment because the acceptor failed to pay the instrument when due.

It is evident from what has been said in this section, that acceptance, in the technical sense here used, does not have any application to any other instruments than bills of exchange. Although a note is in the nature of a bill of exchange drawn by the maker on himself, the maker, as soon as it is issued, has promised to pay it. (See, *post,* Appendix A, Negotiable Instruments Law, §110.)

TIME—KINDS—FORM.

38. Acceptance of a bill of exchange may occur—
- **After the instrument is complete.**
- **Before the instrument is complete; which may be on—**
  - **The paper on which the bill subsequently is drawn.**
  - **A separate paper.**

Acceptance of an existing bill of exchange may occur after the bill is overdue.

Acceptance of an existing bill of exchange may be—
- **Express—**
  - **General, or according to the tenor of the bill.**
  - **Qualified.**
- **Constructive or Implied.**

Express acceptance of an existing bill of exchange may appear on—

The instrument itself.

A separate paper.

Express acceptance on an existing bill of exchange must be in writing, signed and delivered.

Express acceptance is indicated by any language showing an intention by the drawee to pay.

Acceptance may appear on any part of the bill of exchange.

Acceptance, once complete, cannot be revoked except for reasons applicable to contracts in general.

The holder of a bill of exchange may require that acceptance thereof be written on the instrument itself.

If acceptance of a bill of exchange is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a holder who has seen such acceptance and who receives the bill for value in reliance thereon.

An unconditional promise in writing to accept a bill of exchange yet to be drawn is treated as an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

The drawee of an existing bill of exchange is allowed twenty-four hours by law after it is presented to him, to decide whether or not he will accept it; but acceptance when given is treated as given on the day it was presented to him. Further time may be allowed the drawee by agreement.

Acceptance may occur after a prior refusal to accept; but, in such a case, if the bill was payable after sight, the holder can require a subsequent acceptance to be given as of the date it was first presented. Such subsequent acceptance will not terminate rights or liabilities resulting from a former refusal to accept.

Acceptance of a bill of exchange may occur any time from the time the drawing of it is contemplated up to the time of its payment, that is, it is possible for acceptance to occur before a bill of exchange is drawn, which, of course, could not be on the completed instrument itself; and acceptance on the instrument itself might be obtained by the drawer from the drawee prior to delivery to the payee, either before or after the bill is complete. After delivery to the payee, any holder may obtain acceptance, even after the bill is overdue. (See, *post,* Appendix A, Negotiable Instruments Law, §226.) Sometimes the drawer wishes to deliver an accepted bill of exchange to the payee but may not know the amount or other terms which are to be inserted therein. For convenience, the drawee may accept a bill in any state of incompleteness from a blank sheet of paper on which the bill subsequently is written, to an instrument with but one blank for the insertion of the amount, of the time of payment, or of some other term.

Acceptance of an existing bill of exchange may be expressed in words or, in some cases, implied from conduct; and an express acceptance may be general or qualified.

An oral express acceptance of a bill of exchange is not enforceable (see Appendix B, Case No. 6), and the holder can treat such an acceptance as if no acceptance at all had been given. Not only must an acceptance be in writing, but it is not sufficient unless signed by the drawee (see, *post,* Appendix A, Negotiable Instruments Law, §220); and, as in the case of any written contract, an acceptance is not binding on the drawee until it is delivered. Such delivery may be actual or it may be constructive, as by notification to the holder that the bill has been accepted. (See, *post,* Appendix A, Negotiable Instruments Law, §2, "Acceptance.") The mere fact of writing and signing an acceptance would not bind the drawee if he canceled the acceptance before re-

turning the bill or notifying the holder. On the other hand, after a bill has been accepted by the drawee and such acceptance has been delivered, the acceptance is irrevocable although resulting from an erroneous belief on the part of the acceptor, provided, of course, the holder did not act in bad faith and there are no other reasons which would allow any contract to be rescinded. (See Appendix B, Case No. 7.)

An acceptance might be written on any part of a bill of exchange, though it usually is written *across* the front of the instrument, sometimes over the other writing and sometimes at the end. Placing it over the other writing tends to prevent alteration. The usual form is to write "Accepted" followed by the drawee's signature; but anything indicating an intention to pay will suffice. Thus, "honored," "presented," "seen," "I will pay this bill," and "payment guaranteed" have been held to be sufficient; though "I take notice of the above" has been held to be insufficient. A date is not necessary although it is good business to have the date of any acceptance shown, especially if the time of payment depends on the day of acceptance; as "thirty days after sight." In the latter case any holder may insert the true date of acceptance. (See, *post,* Appendix A, Negotiable Instruments Law, §32.) Whenever an acceptance bears a date it is deemed *prima facie* to be the true date (see, *post,* Appendix A, Negotiable Instruments Law, §30); and even an incorrect date can be treated as the correct one by a subsequent holder who has received the bill in good faith.

Acceptance, to be sufficient for all purposes, should be on the instrument itself so that each subsequent holder can ascertain therefrom the exact liability of each party thereon; and the holder of a bill of exchange can require the acceptance to be written on the instrument itself, treating a refusal by the drawee to write his acceptance on the bill as a

refusal to accept. (See, *post,* Appendix A, Negotiable Instruments Law, §221.) Such an acceptance is sometimes called a "proper" acceptance.

Sometimes acceptance is given on a separate paper; and such an acceptance may refer to an existing bill or to one yet to be drawn. Acceptance on a separate paper is usually in the form of a letter or telegram sent by the drawee, either voluntarily or in response to an inquiry from either the drawer or some holder, stating that the bill will be paid. (See Appendix B, Case No. 8.) Thus one person, desiring to draw bills of exchange on another, writes to the latter telling him of the writer's wish and describing the bills it is desired to draw and asking him if he will accept them when presented; or, after a bill is drawn, the drawer or some holder, who found it inconvenient to see the drawee personally, sends a letter or telegram describing the instrument and asking the drawee whether he will pay it. An acceptance on a separate paper does not bind the acceptor except in favor of those persons to whom it is shown and who, on the faith thereof, receive the bill for value. As to others, such an acceptance is not binding. (See, *post,* Appendix A, Negotiable Instruments Law, §222.)

The drawee in a bill yet to be drawn may not promise to *pay* it but merely to *accept* it; but an unconditional promise to accept is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. (See, *post,* Appendix A, Negotiable Instruments Law, §223.)

What is known as a "traveler's letter of credit" issued by a banker (or others) to enable a person, while traveling, to obtain money in other places, is in effect a promise to accept bills drawn upon such bank up to a designated amount. These letters of credit name the payee, usually bear his signature and sometimes describe him for the purpose of identification, and

require the party advancing money to the payee and drawing a bill on the party issuing the letter of credit, to refer to the number borne by the letter of credit and to enter upon the letter of credit the amount advanced, so that it cannot be overdrawn.

The drawee of a bill of exchange is allowed twenty-four hours by law, if he desires it, in which to decide whether he will accept. This does not mean that he cannot accept it after that time but that the holder, after the expiration of that time, is justified in concluding that it will not be accepted at all and in basing his future acts on that presumption. (See, *post,* Appendix A, Negotiable Instruments Law, §246.) If the drawee accepts within twenty-four hours, the date of such acceptance will be the day the bill was first presented to him. (See, *post,* Appendix A, Negotiable Instruments Law, §224.) Of course an acceptance or a definite refusal to accept may occur at the very instant the bill is presented to the drawee. In event of either occurring, the holder may at once treat the action of the drawee as final and govern himself accordingly.

After a refusal to accept, the drawee may change his mind and accept at any time, though he cannot thereby put an end to rights or liabilities resulting from his former refusal. If the bill was payable after sight, the holder is entitled to have any subsequent acceptance given as of the date of the first presentment, unless he has made a different agreement. (See, *post,* Appendix A, Negotiable Instruments Law, §226.)

By express understanding between the parties, the drawee may be allowed more than twenty-four hours for deciding whether or not he will accept. He may be expecting to collect some money for the drawer, and the holder may be willing to wait to see if the money is collected, as, in that case, the drawee would be willing to accept.

GENERAL AND QUALIFIED.

39. A General acceptance is agreement to pay the bill in accordance with its terms or tenor.

A Qualified acceptance is one agreeing to pay on terms differing from those expressly or impliedly named in the bill; as one made—

With the addition of a condition.
With a change in the amount.
With a change in the time of payment.
With a change in the place of payment.
By fewer than all of the drawees.

The holder of a bill of exchange is not required to take a qualified acceptance; but if he does so it is not binding on parties who do not assent to it.

Assent to a qualified acceptance will be implied if a prior party, when notified thereof, does not dissent thereto within a reasonable time.

A bill of exchange states the amount to be paid, the drawee, and either expressly or impliedly designates the time and the place of payment; other terms may be specified. All of the terms expressly or impliedly appearing upon the face of an instrument are called its "tenor." Acceptance should be according to the tenor of the bill; and such an acceptance is called a "general" one. Any variation from the terms of the bill, made by the acceptor, is a "qualified" acceptance (see, *post,* Appendix A, Negotiable Instruments Law, §227), which the holder is not required to take; if the drawee refuses to give an unqualified acceptance the holder may, in turn, refuse a qualified acceptance and may treat the bill as if the drawee had refused to give any acceptance. (See, *post,* Appendix A, Negotiable Instruments Law, §§230, 246.)

An acceptance may be qualified in various ways. (See, *post,* Negotiable Instruments Law, §229.) An acceptance annexing conditions which did not expressly nor impliedly appear in the bill is a qualified one. A very common condition annexed to an acceptance is a promise by the drawee to pay "when in funds," which means that the drawee does not hold any funds of the drawer at the time of the presentment of the bill for acceptance, but the drawee is willing to pay the bill as soon as he receives any money which the drawer has a right to demand. Such an acceptance might be given by one who is collecting money from time to time for the drawer, but who does not wish to assume unconditional liability.

Another qualification which a drawee sometimes desires to make in his acceptance might arise from the fact that, while he has funds of the drawer, he does not have as large a sum as the amount named in the bill of exchange; or he might not have any funds at all, yet be willing to assume a limited liability though not for the full amount named. If for these or for other reasons the drawee accepts the bill but specifies an amount differing from that named in the instrument, such acceptance is a qualified one.

Every negotiable bill of exchange either expressly or impliedly designates a time for payment. This time might not be convenient for the drawee, though he is willing to pay at a different time. An acceptance specifying a time of payment differing from that in the bill is a qualified one.

Likewise a bill of exchange either expressly or impliedly designates a place of payment, which might not be as convenient for the drawee as some other place; but if he accepts the bill by agreeing to pay it at a different place than the one designated therein, the acceptance is qualified. However, an acceptance to pay at a par cular place is general unless it expressly states that the bill is to be paid there only and not

elsewhere. (See, *post,* Appendix A, Negotiable Instruments Law, §228.) Thus, the acceptance of a bill of exchange payable in Chicago would not be qualified merely because it was accepted "payable at First National Bank," although it is impliedly payable at the drawee's place of business, as the holder is given the option of presenting it for payment at the First National Bank; but if the bill was accepted "payable at First National Bank *only,*" the acceptance would be a qualified one, as the place of payment is restricted to one place which is different from that implied in the bill.

If a bill of exchange names more than one drawee with the intention that they shall act jointly in all matters relating to the instrument, acceptance should be by all of them, and an acceptance by fewer than all would be a qualified one.

The holder of a bill of exchange is not required to take a qualified acceptance, and may treat such an acceptance as a refusal to accept. If the holder should take a qualified acceptance all prior parties are discharged from liability, except those who previously have expressly or impliedly authorized such an acceptance, or who subsequently assent thereto.

If the drawer did not have any reason to expect a general acceptance, as where he drew for more than he knew he had any right to draw, his authorization of a qualified acceptance might be implied.

If the drawer or a prior indorser of a bill of exchange receive notice of a qualified acceptance, he must express his dissent to the holder within a reasonable time or he will be deemed to have assented thereto. (See, *post,* Appendix A, Negotiable Instruments Law, §230.)

A qualified acceptance is assented to by subsequent holders by their receipt of the instrument.

To summarize, if a bill of exchange be drawn on Walter H. Eckert and Frank M. McKey for $100 payable thirty days after sight, the drawees might write across its face—

"Accepted March 3, 1917. Walter H. Eckert. Frank M. McKey."

"Accepted, March 3, 1917, payable at National Bank of Commerce. Walter H. Eckert. Frank M. McKey."

"Accepted, March 3, 1917, payable at National Bank of Commerce only. Walter H. Eckert. Frank M. McKey."

"Accepted, March 3, 1917, when in funds. Walter H. Eckert. Frank M. McKey."

"Accepted, March 3, 1917, for $50. Walter H. Eckert. Frank M. McKey."

"Accepted, March 3, 1917, payable April 7, 1917. Walter H. Eckert. Frank M. McKey."

"Accepted, March 3, 1917. Walter H. Eckert."

The first two are general acceptances; the others are qualified and the holder is not compelled to take them, but, if he does, the drawer and prior indorsers, if any, are discharged unless they do not dissent upon being notified of such qualified acceptance.

CONSTRUCTIVE.

40. Acceptance is implied by the drawee destroying the bill, or by his refusing to return it within twenty-four hours after its delivery to him for acceptance or within such additional time as the holder may have allowed.

Acceptance of a bill of exchange does not result from the drawee becoming the holder thereof.

If a bill of exchange has been left with the drawee for acceptance, his intentional destruction thereof is construed as acceptance. Likewise his inexcusable refusal to return the bill after the expiration of twenty-four hours from the time it was delivered to him for acceptance, or after the

expiration of such additional time as may have been allowed him, will be deemed an acceptance. (See, *post,* Appendix A, Negotiable Instruments Law, §225.)

Generally it is the duty of the holder, having left a bill with the drawee for acceptance, to call or to send for it, and the drawee will not become liable from the holder's delay in this respect. Usage or agreement might make it the duty of the drawee to return the bill, accepted or unaccepted, to the holder, in which case his unexplained failure to return it might be regarded as a refusal to do so.

The fact that the drawee of a bill of exchange has become a holder of it does not indicate acceptance. Thus, if *A* gives *B* a bill of exchange on *X* payable "thirty days after date," and *B* transfers it to *X* in some transaction, and *X,* later, without formal acceptance, transfers the bill to *C, X* does not thereby become the party primarily liable for payment, nor did his receipt of it constitute payment.

SEPARATE PAPER—REQUIREMENTS.

41. If acceptance be made of a bill of exchange not in existence it is requisite that—

The terms of a bill be reasonably described.

The bill be drawn within a reasonable time thereafter.

As has been said *ante,* in §38, a bill of exchange may be accepted before it is drawn, and such acceptance will be sufficient if the holder has been shown the acceptance, which must be in writing, and, on the faith thereof, received the bill for value. There are a few other requisites.

An acceptance of a bill of exchange yet to be drawn must describe it so that any party subsequently taking the bill in reliance on such acceptance may see that the bill conforms to the description and comes within the terms of the acceptance.

As it is unreasonable to suppose that a person agreeing to accept bills of exchange to be drawn on him intended to bind himself indefinitely in this respect, bills drawn on the strength of a promise to accept must be drawn within a reasonable time after such promise is given.

WHO MAY ACCEPT.

42. Generally no one but the drawee can accept a bill of exchange.

With a few somewhat unimportant exceptions, the rule is that no one but the drawee named in a bill of exchange has a right to accept it. An agent having express or apparent authority to accept bills of exchange for his principal can accept bills in his principal's name if addressed to the principal, but not in his own name. If he uses his principal's name, the agent's act becomes the act of the principal; but if the agent uses his own name alone, the acceptance would be regarded as made by a stranger. Likewise, if a bill of exchange be addressed to the agent, an acceptance in the name of his principal would be treated as made by a stranger. Thus, where a bill was drawn on "E. C. Hamilton" and was "accepted" by "Empire Mills, E. C. Hamilton, Treas.," it was held not to have been accepted by the drawee.

If a bill of exchange is addressed to a number and street only, without stating the name of the drawee, the person at such place who accepts the bill will be presumed to be the one intended; and where the name of the drawee is not correctly given, an acceptance by the person intended, in his correct name, is sufficient.

As was said *ante*, in §39, where a bill of exchange is drawn on two or more jointly, acceptance by fewer than all is a qualified acceptance, but acceptance by fewer than all has been held to bind those who did accept unless their acceptance was conditional on all accepting. Of course one joint drawee

can accept in the names of the others if he has authority to do so, as where the drawees are partners. (See, *ante*, "Partnership," §28.)

If a third person going through the form of accepting a bill of exchange is liable at all, it would be upon a collateral contract and not as a technical acceptor, as the drawer has not made any offer to him, and to hold him liable as an acceptor would be forcing a contract on the drawer. As between the holder of the bill of exchange and the person attempting to accept it, there would appear not to be any consideration for the promise to pay.

Acceptance by a person other than the drawee is recognized and enforced by law where such acceptance is for the honor of some one or more of the parties to the instrument—that is, to save the credit of such party or parties, such acceptance being known as "acceptance *supra* protest." After a bill has been presented to the drawee for acceptance and acceptance refused, the person accepting *supra* protest undertakes to pay the bill to subsequent parties if the drawee does not pay it when it becomes due. The holder of a bill of exchange is not required to take such an acceptance; but if he does, he cannot bring suit against the party for whose honor the bill has been accepted until it is due and the acceptor *supra* protest is in default. Acceptance *supra* protest being quite unusual, further space will not be devoted to it here. Other rules relating to it are set out, *post*, in Appendix A, Negotiable Instruments Law, Article XIV.

ADMISSIONS OF ACCEPTOR.

43. By accepting a bill of exchange, the drawee admits:

The existence of the drawer.
The capacity of the drawer.
The authority of the drawer.
The genuineness of the drawer's signature.
The existence of the payee.
The capacity of the payee to indorse.

The drawee of a bill of exchange, by accepting it, does not admit:

The genuineness of the body of the instrument.

The genuineness of the signatures of others than the drawer.

A part of the contract made by a party to a negotiable instrument is generally implied, such implied portion frequently being much longer than that which is written, and is based on custom and on the presumed intention of the party to do whatever is reasonably necessary for credit to attach to the instrument as a circulating medium. The express contract of an acceptor is very brief, usually consisting of one word followed by a date and a signature (see, *ante,* §38); but by the very act of accepting, unless there is some express provision to the contrary, the drawee is held to admit, or to be estopped from denying, certain facts which he has better opportunities for knowing that the holder might have, who has taken a bill of exchange in good faith. These admissions frequently are designated as the acceptor's implied warranties. (See, *post,* Appendix A, Negotiable Instruments Law, §112.)

As the drawer is usually someone who has had prior business dealings with the drawee, the latter is presumed to know that such a person as the former exists and that he has legal capacity to enter into the contract.

Theoretically a bill of exchange is drawn against funds of the drawer in the hands of the drawee which the drawer has a right to demand; acceptance admits to the holder that this theory is a fact. This implied admission, however, is not made to the drawer.

As the drawer is usually a customer or correspondent of the drawee, the drawee is presumed to know the signature of the drawer (see Appendix B, Case No. 9), so

that acceptance will bind the drawee to an innocent holder although the drawer's signature is a forgery. [See, post, Appendix A, Negotiable Instruments Law, §112(1).]

As acceptance by the drawee is a promise to pay the payee or anyone to whom the payee may order the bill paid, it follows that the acceptor impliedly admits the existence of the payee named in the bill, and that such payee is legally competent to indorse the instrument. The acceptor does not admit, however, that an agent has authority to sign the payee's name. [See, *post,* Appendix A, Negotiable Instruments Law, §112(2).]

The reasons for presuming knowledge by the drawee of the genuineness of the drawer's signature do not apply to other writing in or on the bill of exchange. While the drawer's signature would generally be in his own handwriting, the instrument is not necessarily written by him, so there would not be any justice in holding that the acceptor admitted that alterations had not been made in the instrument. The holder himself must assume that risk. In fact the person who receives an altered bill of exchange from the person who made the alteration is the negligent one. If, however, the drawer's signature is a forgery as well as the body of the instrument, acceptance by the drawee obligates him to pay the forged instrument. Thus, if a bill of exchange for $1,000 is drawn by *A* on *B* payable to *C*, and then the payee's name, the amount and the drawer's signature are wrongfully erased, the name of *X* substituted as payee for that of C, and $2,000 substituted for $1,000, after which *A*'s signature is rewritten, a subsequent acceptance by *B* would make him liable for the increased amount to an innocent holder. It is the same as if there never had been an original valid instrument. If, however, *A*'s signature had not been removed, and the name of the payee and the

amount only had been altered, *B,* by his subsequent acceptance, would not be liable on the instrument as altered.

There is no ground for presuming that an acceptor is familiar with the signature of the payee, as the payee may be a stranger to him, and there is still less probability of the acceptor knowing the signatures of subsequent holders; hence the acceptor does not impliedly admit that what purports to be the signature of the payee, or the signature of any other person than the drawer, is genuine although on the instrument at the time of the acceptance. (See Appendix B, Case No. 13.) Thus where a bill of exchange payable to Henry Davis came into the possession of another Henry Davis who indorsed it, and it was then accepted by the drawee, the acceptor was not liable to a holder who took it in good faith in reliance on such forged indorsement. As rules of law are rigidly applied, the acceptor does not admit the genuineness of the signature of the payee even though the drawer and the payee are the same person.

1. Tranfers title
2. Warrants instrument
3. [illegible] to ind[illegible] personal defenses.

CHAPTER IV.

TRANSFERS.

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METHODS.

44. Transfer of a negotiable instrument may result from—

Negotiation.
Assignment.

It is to be expected that negotiable instruments will pass from hand to hand; and it is the extent of the rights acquired by a transferee which make this subject one of the leading branches of law. As the extent of such rights depends upon the manner in which a transfer is made, the method becomes very important. There are two methods by which a negotiable instrument can be transferred, namely, by negotiation and by assignment.

NEGOTIATION—DEFINITION.

45. Negotiation is the transfer of a negotiable instrument in such form and manner as will give the transferee all the rights, benefits and privileges arising from negotiability.

Transfer by negotiation gives the transferee all of the rights, benefits and privileges derived from negotiability; assignment does not; hence negotiation is the proper and customary method of transferring a negotiable instrument.

NEGOTIATION—METHODS—INDORSEMENT.

46. Negotiation may result from—
Indorsement and delivery.
Delivery alone in some cases.

Indorsement is writing the signature of a person, called an indorser, on an instrument, with intention to transfer title thereto, or to add security, or to accomplish both of these purposes.

Negotiation may be made in two ways, depending upon the form of the instrument at the time of its transfer. (See, *post*, Appendix A, Negotiable Instruments Law, §60.) In most negotiable instruments a payee is designated therein

at the time it is issued, in which case negotiation, that is, a transfer which will give the transferee all the rights, benefits and privileges which a negotiable instrument possesses, may require an indorsement by such payee, that is, he must sign his name on the instrument with the intention of transferring it, and he then is known as an "indorser."

"Indorsement" is derived from two Latin words, *in dorso,* meaning "on the back" as that is where indorsements usually are placed; but an indorsement may be made on the front of an instrument. However, if a person sign his name on the front of a negotiable instrument it might be questionable whether he intended to indorse, or to sign in some other capacity; but unless he clearly indicates his intention to be bound in some other capacity, he will be deemed to be an indorser. (See, *post,* Appendix A, Negotiable Instruments Law, §§36 (6), 113.)

The *proper* place for an indorsement is *across* the *back* on the reverse of the left end of the front of the instrument. The natural way of handling a negotiable instrument in its ordinary form is to pick it up with the right hand at one end. A twist of the wrist turns it over, bringing the left-hand end at the top, so that indorsements made there are seen without trouble.

Indorsements should appear in order of time (see, *post,* §102); hence, the first indorsement should be made at the upper end as above described, and subsequent ones should be placed immediately below those already made. If two or more indorse jointly and it is not evident from the former wording of the instrument that they are so indorsing, something should be added to indicate their joint liability, otherwise they may be held as successive indorsers by those ignorant of their intention.

While there is a presumption that indorsements were made in the order in which they appear, it can be shown, as

between certain indorsers, that the order actually was different, though the rights of other parties cannot be affected. Likewise an indorser and his indorsee may make any agreement in regard to the order in which they individually shall be liable, and this agreement may be binding on them (see, *post,* Appendix A, Negotiable Instruments Law, §118), though it cannot affect the rights of others. Thus, if *A* indorsed an instrument to *B* as a gift, they could agree that, if *A* should be called upon by any subsequent holder to pay the instrument, *A* could recover from *B,* though this would not affect the right of any subsequent holder to enforce the instrument against *A*.

An indorsement must appear on the instrument itself, a transfer, although in writing, on a separate paper being merely an assignment. If, however, the back of a negotiable instrument becomes filled with indorsements, the law allows a slip of paper to be pasted on for subsequent indorsements, this slip becoming a part of the instrument and being known as an Allonge (pronounced allunzh and accented on the last syllable, and is derived from the French). An allonge would be allowable even though there might be room on the instrument to write an indorsement. (See, *post,* Appendix A, Negotiable Instruments Law, §61.)

NEGOTIATION—INDORSEMENT—FORM—AMOUNT.

47. An indorsement is not required to be in any particular form. Anything indicating an intention to incur the liability of an indorser is sufficient.

Indorsement cannot be made of a part only of the amount due at the time of the transfer.

While, as has been seen, the law is rather technical in regard to the wording of a negotiable instrument, an indorsement thereof may be quite informal; and the words "order" or "bearer" are not required. The instrument being originally negotiable remains so. (See, *ante,* §8.) Thus, while an indorsement might read: "Pay to the order of *A,*" an indorsement, "Pay *A*" and signed would be just as effective to give *A* the power to order payment in turn to someone else. (See, *ante,* Appendix A, Negotiable Instruments Law, §66.)

As the law usually looks to the substance rather than to the form of any writing, giving effect to the intention of the person who made it if such intention be clear and does not violate any rule of law, any writing on a negotiable instrument showing an intention to transfer it may be construed to be an indorsement giving the transferee all the rights and privileges to be derived from negotiability, although the transferror may not have used proper legal terms. Thus, such expressions as, "I hereby assign this draft," and "I this day sold and delivered to *A* the within note," have been held to be indorsements in the absence of any evidence to the contrary.

As in the case of any contract, an indorser will bind himself by any name or mark intended by him as a signature; but, for practical purposes, an indorsement by one whose name appears on the instrument should be in the same form, even though incorrect. If the name, as it appears, is incorrect, the incorrect name should be indorsed followed by the correct name. Thus, if an instrument has been indorsed to "James M. Smith" when it should have been "James N. Smith," and Mr. Smith wishes to indorse it to someone else, he should write "James M. Smith" followed by "James N. Smith." (See, *post,* Appendix A, Negotiable Instruments Law, §73.) Legally either alone would suffice; but, in that case, the burden might be thrown on sub-

sequent holders of showing that "James M. Smith" and "James N. Smith" were the same person, which practically would interfere with the ready circulation of the instrument.

For a similar reason, if an indorsee's name is completely given he should indorse in the same way and not with abbreviations or omissions. Thus, if the indorsee is "James N. Smith" he should not indorse "J. N. Smith" or "James Smith," though, legally, either of these two methods would be sufficient; but, as the greater includes the lesser, it is proper and better for an indorser to give his full name, even though his initials alone appear as indorsee, especially if it be his custom to sign his full name. Thus, an instrument indorsed to "J. N. Smith" could properly be indorsed by him as "James N. Smith," as "James N. Smith" is clearly "J. N. Smith," though the reverse might not be true. Giving the full name serves to identify the indorsee and might aid circulation.

If a payee or indorsee be dead his personal representative should indorse it; as, "P. R., executor of J. S., deceased."

As between the parties, mere indorsement without delivery is insufficient to give anyone the rights of an indorsee. (See, *post*, Appendix A, Negotiable Instruments Law, §2, "Indorsement.")

An indorsement must be for the whole amount due on the instrument; if an indorser attempt to split up the amount so as to give separate rights to two or more indorsees, the indorsement is illegal and, hence, void. Even after an attempted indorsement of a part only of the amount, if a later indorsement attempts to transfer the balance to the former transferee, such transferee does not become an indorsee, as two bad indorsements cannot make one good one.

Thus, if an instrument calls for $500, the holder could not indorse $400 of it to *A* and retain $100; nor could the holder

indorse half to *A* and the other half to *B*. If, however, $100 should be paid on the instrument by the maker, it could be indorsed to *A* although the transfer would be of $400 only (see, *post,* Appendix A, Negotiable Instruments Law, §62); or the instrument could have been indorsed to *A* and *B* jointly, as the two then constitute one party.

Likewise, if *A* lent the holder $400, the instrument could be indorsed to *A* to secure this $400, but in that case the entire instrument is transferred; nor is there any objection, after an indorsement of the entire amount, for the indorser to enter into a collateral agreement that the indorsee is to hold a part of the money due on the instrument in trust, either for the indorser or for some third person. A person by an indorsement so worded might guaranty payment of an amount less than the entire amount transferred.

Generally, an indorser is liable for every amount for which the primary party would be liable. Thus, if a promissory note should provide for the payment of an attorney-fee, an indorser of the note would be liable for such fee to the same extent as the maker.

NEGOTIATION—INDORSEMENTS—CLASSIFICATION.

48. Indorsements are subject to classifications as follows:

- **As to form:**
  - **In Blank.**
  - **In Full or Special.**
    - **Absolute.**
    - **Restrictive.**
    - **Conditional.**
    - **Contingent.**
- **As to extent of liability:**
  - **General or Unqualified.**
  - **Qualified or Without Recourse.**
  - **Facultative.**
- **As to manner of liability.**
  - **Regular or Ordinary.**
  - **Irregular or Anomalous.**

In order to make a logical classification of all of the various kinds of indorsements recognized by law, it is necessary to regard them from three different standpoints, resulting in the classification set forth above. Every indorsement will come under some head of each of these three classifications.

NEGOTIATION—INDORSEMENTS—IN BLANK—IN FULL.

49. An indorsement In Blank is one not specifying any indorsee.

A Special indorsement or indorsement In Full specifies a person to whom, or to whose order, payment is to be made.

An indorsement in blank by a person entitled to payment makes the instrument in effect payable to bearer.

A special indorsement requires the further indorsement of the person to whom it is indorsed before it can be negotiated further, unless the instrument originally was payable to bearer; and such further indorsement may be in blank or in full.

The holder of an instrument indorsed in blank has the privilege of writing above the signature of the indorser any contract not inconsistent with the intention of the indorser. The holder can change an indorsement in blank to an indorsement in full; but he cannot change an indorsement in full to one in blank.

Every indorsement either does or does not designate a party to whom payment is to be made. (See, *post,* Appendix A, Negotiable Instruments Law, §63.) If a person, known as the "indorsee," be specified, the indorsement is called a "special" indorsement or an indorsement "in full"; but if an indorsee be not designated, the indorsement is called

an indorsement "in blank." (See, *post,* Appendix A, Negotiable Instruments Law, §64.)

Thus, if *A* be payee named in a negotiable instrument which he wishes to transfer to *B, A* can do one or the other of two things—he can simply sign his name on the back without anything more (see, *post,* Appendix A, Negotiable Instruments Law, §61), or he can write, "Pay to the order of *B*" or "Pay *B,*" followed by his signature. The former would be an indorsement in blank; the latter, an indorsement in full or special indorsement.

An indorsement in blank by any holder makes an instrument in effect payable to bearer (see Appendix B, Case No. 19); as it does not specify any particular person to whom payment is to be made, it becomes payable to anyone, so that it can be negotiated by delivery only. (See, *post,* §62.) If, however, an indorsement by the payee of a negotiable instrument specifies an indorsee, subsequent negotiation requires the indorsement of such indorsee; and such subsequent indorsement may likewise be in blank or in full. As long as indorsements by the successive holders of a negotiable instrument are all in full, further negotiation requires the indorsement of the last indorsee; but the instant any indorsee indorses in blank, the instrument becomes in effect payable to bearer as long as the indorsement remains in that form, and is the last one. [See, *post,* Appendix A, Negotiable Instruments Law, §28(5).]

The holder has the right to change an indorsement in blank to one in full by writing over the signature of the indorser a direction to make payment to himself or to any subsequent holder or to the person to whom he wishes to transfer it. (See, *post,* Appendix A, Negotiable Instruments Law, §65.) The presumed intention of the indorser is that he authorized the holder to make it payable to whomsoever he chose.

Probably all indorsements originally were in full; but as the indorser sometimes may have been hurried or did not know the name of his transferee, he merely signed his name on the back with the expectation that the transferee would fill in the name. This authority to the holder to fill in any name made the instrument, once indorsed in blank and remaining so, transferable by delivery only, being similar to an instrument originally made payable to bearer.

Although an indorsement in blank may be changed to an indorsement in full, an indorsee cannot strike out or alter any part of an indorsement as written, unless the indorser consents, hence cannot change an indorsement in full to one in blank. (See Appendix B, Case No. 10.) That would be at least a material alteration (see, *post,* §101); or, if done with fraudulent intent, might constitute forgery. (See, *post,* §80.) A holder, however, may strike out an entire indorsement. (See, *post,* §60.)

Notwithstanding an instrument once indorsed in blank becomes transferable by delivery only, this does not prevent subsequent indorsements from being made. (See, *post,* Appendix A, Negotiable Instruments Law, §117.) In fact it might be good business for the transferee of a negotiable instrument which, in effect, is payable to bearer, to require the indorsement of his transferror.

It might happen that the holder of an instrument originally payable to bearer (see, *ante,* §31) transfers it by an indorsement in full. This will not prevent the instrument from afterwards passing from hand to hand by delivery only; but the holder who made the indorsement in full would not be liable to anyone who could not trace title through his indorsee (see, *post,* Appendix A, Negotiable Instruments Law, §70), that is, as long as his indorsee does not indorse in turn, such indorser could not be held liable by anyone except his indorsee. Thus, suppose a negotiable instrument payable to "bearer" is indorsed by *A* and *B* is

named as indorsee. *B*, without having indorsed the instrument, loses it and the finder delivers it to *C* who takes it for value and in good faith. As the instrument is payable to bearer and transferable by delivery only, *A*, who has indorsed in full to *B*, cannot be held liable by anyone except *B* or those who might hold *B* liable, and, in this illustration, no one could hold *B* liable as he had not indorsed the instrument nor delivered it, hence *A* would not be liable to subsequent holders. If *B* had indorsed in blank before he lost the instrument, *A* then would be liable to every subsequent holder in good faith, as *B* thereby became liable to subsequent holders, and any subsequent holder could call on *A* for payment through his liability to *B*. If, however, a negotiable instrument originally not payable to bearer should subsequently be indorsed in blank so as to become transferable by delivery only, a subsequent indorsement in full would require a further blank indorsement before it would become in effect payable to bearer again. [See, *post*, Appendix A, Negotiable Instruments Law, §28(5).] Thus, if an instrument should name *A* as payee thereof, and he indorses it in blank, it then becomes in effect payable to bearer; but if *B*, a subsequent holder, should write an indorsement in full on the instrument, naming *C* as his indorsee, further indorsement by *C* would be required to give subsequent holders good title.

NEGOTIATION—INDORSEMENTS—RESTRICTIVE—CONDITIONAL.

50. A Restrictive indorsement is one which prohibits further negotiation of the instrument; or which deputizes the indorsee to be the agent of the indorser for collection of the instrument; or which designates the indorsee as the trustee for another.

A Conditional indorsement is one which makes the liability of the indorser depend upon some condition named; or which mentions some condition whose performance is required before the indorsee can acquire title, or whose non-performance may defeat the indorsee's title.

Most special indorsements are absolute, that is, free from restrictions and conditions; but as the parties are at liberty to enter into any agreement they please, provided it is not illegal, an indorser is at liberty to restrict the rights of his indorsee, or to make his indorsee's title conditional. Indorsements of this character are designated as "restrictive" and "conditional."

A restrictive indorsement is used for three purposes, first, where the indorser wishes to prohibit negotiation by his indorsee; second, where the indorser wishes to constitute the indorsee his agent; and third, where the indorser wishes to make the indorsee a trustee for a third person. (See, *post,* Appendix A, Negotiable Instruments Law, §66.) In the last instance the indorsee is an actual trustee; in the first and second cases the indorsee's position is in the nature of a trustee for the benefit of his indorser. In all three instances the indorsee has a right to the possession of the proceeds of the instrument, at least temporarily, but in no case is he entitled to their benefit.

While an instrument originally negotiable remains so, (see, *ante*, §8), it is evidently within the power of any holder of an instrument not payable to bearer or if payable to order and the last indorsement is not in blank, to suspend further negotiation of it by refusing to indorse it at all; and if it is thus in the holder's power to prevent any negotiation, it follows that it may be possible for him to indorse it in such a manner as either partially or absolutely to restrict further negotiation. There is a distinction between the nego-

tiability of an instrument and the negotiation of an instrument. The former relates to the original character of the instrument, the latter to its subsequent transfer; negotiability remains though negotiation is suspended, that is, the form of the instrument would allow it to be negotiated, but negotiation does not necessarily result.

It might be inconvenient or impossible for the holder of a negotiable instrument to collect it in person, in which case he naturally would place it in the hands of an agent for collection. The holder then might be actuated by two motives somewhat conflicting—he might wish his agent to possess power to take any reasonable steps to enforce collection, yet he does not want the agent to be in a position to misuse such authority by asserting ownership of the instrument and disposing of it. If the holder, being the payee or a special indorsee, did not indorse the instrument at all, it might raise a question in the debtor's mind whether the agent had any right to the possession of the instrument and any authority to receive payment. On the other hand, if the instrument should be indorsed so that the agent appeared to be the owner, a dishonest agent could make a disposition of it for his sole advantage. A restrictive indorsement allows the holder to avoid some of the disadvantages arising from the absence of any indorsement and from an absolute indorsement. The holder might indorse an instrument, "Pay to *A* only," in which case *A* would not have any right other than to receive payment; but he would have this right, and he could enforce payment by bringing any suit his indorser could bring. (See, *post,* Appendix A, Negotiable Instruments Law, §67.) It might be more convenient for *A* "to collect" the instrument by transferring it, but he could not do this under such an indorsement prohibiting negotiation. The law allows the holder to escape this difficulty by indorsing it, "Pay to *A* for collection." In

the latter case, although the instrument may be transferred by further indorsement, subsequent holders would acquire only such rights as the agent was authorized to give. As the agent would not have any right to transfer the instrument to pay or to secure an indebtedness of his own, a creditor of the agent taking the instrument in payment of his claim, or as security therefor, would hold it and any proceeds therefrom, for the benefit of the restrictive indorser. (See, *post,* Appendix A, Negotiable Instruments Law, §67; see, also, Appendix B, Case No. 11.)

An indorsement of a check "for deposit" passes title but restricts the rights of the indorsee. Thus, if the payee of a check were to indorse it, "Pay to *X* Bank for collection for my account" and sign and deposit it, and the *X* Bank, in order to facilitate collection, indorsed it to the Bank of *Y,* which collected it, and the *X* Bank then became insolvent and indebted to the Bank of *Y,* the latter could not apply the proceeds on its claim against the *X* Bank but would be compelled to pay the proceeds to the payee of the check.

Where the holder of a negotiable instrument wishes to create a trust for a third person, he can accomplish such purpose by means of a restrictive indorsement worded, "Pay to the order of *A* for the use of *B,*" thus transferring the legal title to *A* and the equitable title to *B,* as in the case of any trust. (See, *ante,* "Elementary Law," §12.) *A* could collect the instrument, even by further negotiation, holding the proceeds in trust for *B;* but if an indorsee of *A* should take the instrument in payment of an individual debt of *A*'s to him, he in turn would become a trustee with the same duty of holding it or its proceeds for the use of *B.* (See, *post,* Appendix A, Negotiable Instruments Law, §67.)

Every general indorsement is subject to conditions implied by law (see, *post,* §82), so that, in one sense, most indorsements might be said to be conditional; but, in the

sense used here, a conditional indorsement is one containing an express condition relating either to the liability of the indorser or to the title of his indorsee. Thus, if the party primarily liable on a negotiable instrument did not pay it, an indorser, by so wording his indorsement, might make his own secondary liability depend on notice thereof being delivered to him at a designated place other than the one implied by law.

A condition in an indorsement affecting the title of the indorsee is either precedent or subsequent. If precedent, its performance is necessary to give the indorsee full title; if subsequent, the performance of the condition divests the indorsee of title previously acquired. (See, *ante,* "Contracts," §89.)

An illustration of an indorsement containing a condition precedent would be, "Pay *A* or order if he becomes twenty-one years of age." An illustration of a condition subsequent would be, "Pay *A* or order unless before payment I give you notice to the contrary." Such indorsements are rare. While theoretically they may not prevent further negotiation of an instrument, practically they would prevent circulation, as every subsequent holder is subject to the conditions. If the condition were precedent, everyone to whom the instrument was offered would have to satisfy himself as to its performance; if the condition were subsequent, its performance might deprive him of title. Thus, in the first illustration above, an indorsee would be put to the trouble of ascertaining whether *A* was twenty-one; in the second, the holder's title would be defeated by notice to the debtor not to pay *A* or any subsequent holder.

If the debtor on a negotiable instrument on which there is a conditional indorsement is required to make payment, he may safely pay the holder although the condition has not been performed; but if the condition is one which may be performed after payment, the party receiving the proceeds will hold them subject to such condition. (See, *post,* Appendix A, Negotiable Instruments Law, §69.)

A contingent indorsement is one making the liability of an indorser or the title of the indorsee dependent upon the happening or not happening of a designated event. Contingencies, like conditions, may be precedent or subsequent, either giving the indorsee title, or taking away his title. As contingent indorsements are so similar to conditional ones, the distinction between them being purely technical, they are designated and treated as conditional, as in the first illustration above.

NEGOTIATION—INDORSEMENTS—QUALIFIED.

51. A Qualified indorsement or an indorsement Without Recourse is one exempting the indorser from liability to indemnify the holder upon dishonor of the instrument.

A general or unqualified indorsement not only transfers title to the instrument but also makes the indorser liable upon an implied contract to indemnify the holder, provided the instrument be presented at maturity to the party primarily liable thereon and the indorser notified of its non-payment. (See, *post,* §82.) However, an indorser might wish to transfer an instrument yet not be willing to become liable to indemnify subsequent holders against loss for its non-payment. This he can do by expressly indicating his intention not to assume any liability to indemnify, as such an intention is implied only, and it cannot be implied directly contrary to one which has been expressed. (See, *ante,* "Contracts," §63.) An intention not to assume liability for indemnity is indicated by the indorser writing the words, "Without recourse" or any words of similar import in connection with his signature, whether the indorsement be in full or in blank. Such an indorsement is designated as "qualified"; and subsequent holders of the instrument, so far as this indorser is concerned, assume the risk of the

financial standing of the other parties on the instrument and cannot look to this particular indorser for payment. (See, *post,* Appendix A, Negotiable Instruments Law, §68; see, also, Appendix B, Case No. 13.)

An indorsement without recourse does not impair the negotiable character of the instrument on which it appears; nor does it necessarily throw any discredit upon it. (See, *post,* §73.) Such an indorsement merely means that this particular indorser does not wish to take any chance of being held liable for payment (see Appendix B, Case No. 17); he himself may not have any financial standing, while the other parties on the instrument may be persons of known financial responsibility. However, an indorsement without recourse might lower the marketable value of a negotiable instrument, as would be the case if the financial standing of the particular indorser was high and the other parties were not well known.

It will be observed that custom has given definite meanings to many very brief expressions used in connection with negotiable instruments; and where a party has not indicated his exact intention, the law implies that he intends to be bound by recognized custom.

Just as an indorser by express terms can qualify his liability, making it less than that which would be implied by law, so he can, by express terms, enlarge his liability. Thus, an ordinary indorser has the right to have the instrument, upon which his indorsement appears, presented at maturity to the person primarily liable thereon, and to have prompt notice given to such indorser if the instrument be not paid at that time. (See, *post,* §82.) This right, being based on custom and simply implied by law, can be waived either wholly or partially; and it will be waived by any express language in the indorsement indicating such an intention, whether the indorsement be in blank or in full. Such an indorsement, enlarging the liability of the indorser and correspondingly reducing the duties of the holder, has been designated as "facultative." An illustration of a facultative

indorsement would be, "Pay to *B*, presentment and notice waived. [Signed:] *A*"; or "Waiving protest. [Signed:] *A*." (See, *post*, §97.)

NEGOTIATION—INDORSEMENTS—REGULAR AND IRREGULAR.

52. A Regular or Ordinary indorsement is one made by a holder of the instrument in a regular chain of title, with the chief object of transferring title.

An Irregular or Anomalous indorsement is one made by a person not in the regular chain of title, usually with the object of giving security.

An instrument may contain all the elements of negotiability and yet practically it may not circulate readily. Anyone can write and sign a negotiable instrument; but, from a business standpoint, the transferee of such an instrument looks to the financial responsibility of the parties thereon. *A* wants to borrow money from *X;* but, as *A* does not possess any property, his note, although negotiable in form, would practically be mere evidence of indebtedness without any security. *B*, however, who is a millionaire, is willing to indorse *A*'s note, and does so. Thus we have a note signed by *A* payable to *X* and indorsed by *B*. *X* transfers this note to *Y*, the indorsement of *X* naturally following that of *B* which was on the note when it was delivered to *X*. What is *B*'s liability? It is evident from an inspection of the note that *B* never owned it, as it is payable to *X* who, therefore, must have been the first holder. *B* could not have received it from *X*, else *B*'s indorsement would follow and not precede that of *X*. If *Y* should, in turn, transfer the note to *Z*, the indorsement by *Y* would naturally follow that of *X*. The indorsements of *X* and *Y* are called "regular" or

"ordinary," as they can be brought into the chain of title from the payee down to the last holder; the indorsement of *B* is designated as "irregular" or "anomalous," as it cannot be made to fit at any point in the chain of title from *X* through *Y* to *Z*.

An indorsement is not irregular merely because it is not necessary to the chain of title; it must be clearly outside. Thus, in the illustration above, if the indorsements were, "*B*"; "Pay *Y*. [Signed:] *X*"; and "Pay *Z*. [Signed:] *Y*," the holder could not possibly bring *B* into the chain of title from the payee, *X*, down to *Z*, the holder, and *B* would be an irregular indorser. If the indorsements were all in blank, that by *X*, the payee, would, in effect, make the instrument payable to bearer, so that the indorsement by *Y* would not be necessary to give *Z* title; yet this would not make *Y* an irregular indorser, as there is nothing on the face of the instrument to indicate that *Y* might not have been a holder after *X*, as he really was.

As has been seen in the preceding section, every regular indorser, except one without recourse, may be liable for payment of the instrument; but the chief object of a regular indorser is to transfer title to the instrument, and not to become security for its payment. In many cases an indorser might not realize that he was making himself liable for payment, as such liability is usually implied. The irregular indorser, however, usually signs with the sole object of becoming liable for payment. He cannot transfer title as he does not possess it. If he indorses in blank before delivery of the instrument, he is liable to the payee and to each subsequent holder, unless the instrument originally was made payable to the order of the maker, or was a bill of exchange made payable to the order of the drawer, in which case the irregular indorser is liable to each holder after the maker or after the drawer. (See, *post*, Appendix A, Negotiable Instruments Law, §114.)

In the illustration above let us suppose that when *A* applied to *X* for a loan, *X* was willing to take *A*'s note without security, and did so. Later *X* wishes to transfer the note but as he is unable to do so on account of the lack of financial responsibility of either *A* or *X*, *B* then indorses the note to enable *X* to dispose of it. It is evident, in such a case, that it would not be just for *X*, the payee, to hold *B* liable, and he could not do so; though *B* would be liable to each holder subsequent to the payee. [See, *post*, Appendix A, Negotiable Instruments Law, §114(3).] In this case the proper place for *B* to indorse would be after *X*; but if the indorsement by *B* should appear before that of *X* it would not affect their rights and liabilities as to each other although it might, in case of a suit, throw the burden on *B* of proving the facts showing that he was not liable to *X*. (See, *post*, Appendix A, Negotiable Instruments Law, §118.) The actual contract of an irregular indorser can be shown orally as against the one with whom it was made or, if necessary, as against one with notice of it at the time the latter acquired the instrument. If all indorsements are in blank and there is nothing to indicate that any indorser is an irregular one, each would be liable as a regular indorser to each subsequent holder without notice, and, as to subsequent holders, would be conclusively presumed to have been at one time a holder of the instrument according to the order in which the indorsements appear. If, however, the indorsement by each holder was in full, the indorsement by the irregular indorser would show that it was irregular. Thus, if *X* is the payee, and the indorsements are: "Pay *Y*. [Signed:] *X*"; "*B*"; "Pay *Z*. [Signed:] *Y*," it is evident, from an inspection of the instrument, that *B* is not brought into the chain of title, hence he must be an irregular indorser.

NEGOTIATION—INDORSEMENT—NATURE.

53. An indorsement is a distinct contract.

The student must fully grasp the important point that an indorsement, although made on a negotiable instrument and based thereon and, to a certain extent, becoming a part of it, is nevertheless an independent contract. (See Appendix B, Case No. 10.)

A regular indorser occupies a position very similar to that of the drawer of a bill of exchange. The drawer of a bill of exchange orders money, at least theoretically due him, paid to someone else. A person holding a negotiable instrument of any kind has a money-claim, evidenced thereby, against the person primarily liable on the instrument; hence, when the holder of the instrument indorses it, he orders payment of the money due thereon, to someone else, very much as if he had drawn a bill of exchange on the party primarily liable.

NEGOTIATION—INDORSEMENT—IMPLIED TERMS.

54. Generally, most of the terms of a contract of indorsement are implied.

A general and ordinary indorsement of a negotiable contract accomplishes three things, namely:

Transfers title.
Indemnifies future holders.
Warrants the instrument.

As has been seen from former sections, a part of the contract of indorsement may be, and sometimes is, expressed; but an indorsement may consist merely of the signature of the indorser (see, *post,* Appendix A, Negotiable Instruments Law, §61), all of the other terms, which are somewhat numerous, being implied. Probably there is no other con-

tract requiring a writing, in which so many of the terms are implied. This results from the fact that centuries of custom recognized by decisions of the courts and, now, by the Negotiable Instruments Law, have fixed the rights and liabilities under an indorsement of a negotiable instrument, so that indorsers and holders are presumed to intend to be governed by such custom, and the terms of an indorsement consisting of a signature only are held to be as definite as if fully expressed. To be otherwise the indorser must clearly indicate a contrary intention; thus, as has been seen *ante,* §51, indorsements without recourse and facultative indorsements expressly negative some of the implied terms of a general indorsement—the former in favor of the indorser, the latter in favor of the holder of the instrument.

An ordinary and general indorsement on a negotiable instrument is intended to accomplish three things, first, to transfer title; second, to indemnify the holder if the instrument be not paid; and, third, to warrant the genuineness and validity of the instrument. The matter of indemnity makes the contract of indorsement an executory one. Of the three things accomplished by an ordinary and general indorsement, the transfer of title, absolute or limited, to the instrument is the chief, as that is the object which the parties intend, and frequently the only object they have in mind. They may be in actual ignorance of the other two effects of an indorsement, which, in a way, are incidental and dependent on a transfer of title and do not become of importance unless future events bring them into prominence, while the transfer of title is a present executed act. Theoretically the parties know the effect of an indorsement, as they are presumed to know the law.

The indorser of an instrument which by its terms or by an indorsement in blank is payable to bearer is liable on his indorsement to the same extent as any indorser, although such

indorsement was unnecessary. (See, *post,* Appendix A, Negotiable Instruments Law, §117.)

NEGOTIATION—INDORSEMENT—REQUISITES.

55. As between an indorser of a negotiable instrument and the person to whom the transfer is made, a contract of indorsement must possess all the elements of any contract.

As between the indorser and the person with whom he deals, the contract of indorsement must contain all the elements essential for any contract (see, *ante,* "Contracts," §9), including competent parties, consideration, and legality. (See, *post,* Appendix A, Negotiable Instruments Law, §94.) In the absence of any evidence on the point, the law presumes that every indorsement is a binding contract; but lack of any essential element can be shown between the indorser and the person with whom he dealt, though generally not against a subsequent holder for value and in good faith. (See, *post,* Chapter V.) If an instrument be transferred under an agreement not containing all of the elements of a binding contract, the liability of the transferror to his transferee will be governed accordingly. Thus, if *A,* the payee of a promissory note, indorse it to *B* as a gift, the title would be transferred by delivery of the instrument, but *A* would not be liable to *B* on any implied contract of indemnity or of warranty, there not being any consideration therefor.

NEGOTIATION—INDORSEMENT—PARTIES TO.

56. A regular indorsement on a negotiable instrument can be made only by the holder of the legal title thereto.

If title to a negotiable instrument be in two or more jointly, all should indorse.

The contract of indorsement is made, not only with the person to whom the indorser transfers the instrument, but with each subsequent holder deriving title through such indorsement.

A regular indorsement, being made with the intention of transferring title, can, of course, be made only by someone having the legal title; but an irregular indorsement, being made merely to add security (see, *ante,* §52), can be made by one not having title.

If the legal title to a negotiable instrument be in two or more persons, all must indorse (see, Appendix B, Case No. 12); if fewer than all attempt to indorse, they effect merely an assignment of their interests. One person might have actual or apparent authority to act as the agent of the other or others; as would be the case if any instrument was owned by a partnership. (See, *post,* Appendix A, Negotiable Instruments Law, §71; see, also, *ante,* "Partnership," §28.)

Joint indorsers, when liable, are liable jointly and severally. (See, *post,* Appendix A, Negotiable Instruments Law, §118; see, also, *ante,* "Contracts," §8.)

In view of the fact that a negotiable instrument is intended to pass from hand to hand and the original parties are liable to any subsequent holder, so, as a general rule, that part of an indorser's contract relating to the warranties and indemnity is made, not only with the person to whom he transfers the instrument, but also with each subsequent holder thereof having good title. (See, *post,* Appendix A, Negotiable Instruments Law, §116). If the indorsement is in blank, it is made with each subsequent holder who has taken the instrument for value and in good faith; but if the indorsement is in full, the indorser's contract would be limited to those who derive title from the indorsee named therein.

NEGOTIATION—INDORSEMENT TO PRIOR PARTY.

57. If a negotiable instrument be negotiated to a prior party thereon, the rights of such party are the same as those of any holder, except that he cannot enforce payment from any intermediate party who, in turn, could hold him liable.

If an indorser should again become the holder of the instrument by a subsequent negotiation thereof to him, his rights would be the same as those of any holder, except that he cannot hold anyone who became a party between the time of his first indorsement and his last acquirement of the instrument, as he in turn would become liable to such party. (See, *post,* Appendix A, Negotiable Instruments Law, §80.) Thus, if *A* should indorse to *B,* and *B* to *C,* and then *C* to *A,* and *A* were allowed to recover from *C* under the last indorsement, *C* then could recover from *A* under the first indorsement and *A* and *C* would be in exactly the same position as before. To prevent this unnecessary trouble, the law does not allow *A* to recover from either *B* or *C.* If, however, the first indorsement by *A* was "without recourse" (see, *ante,* §51), and the subsequent ones were not, *A* then could recover indemnity from either *B* or *C* as neither of them in that case could recover from *A,* the form of this indorsement qualifying his liability and the objection above mentioned would not exist.

NEGOTIATION—INDORSEMENT—PARTIES—CAPACITY.

58. An indorsement by one lacking capacity to enter into a binding contract will transfer a present title although liability thereon is not incurred.

The disaffirmance of a voidable contract of indorsement made by one lacking capacity deprives a subsequent holder thereunder of his rights against parties prior to such indorsement; except that if such indorsement was made by the payee designated in the instrument, such subsequent holder can recover from the party primarily liable on the instrument, under an implied admission that the payee has capacity to indorse.

An indorser occupying a representative capacity is personally liable on his indorsement, unless he in express terms negatives his personal liability.

If the holder of a negotiable instrument lack capacity to enter into a contract, as would be the case with an infant or a lunatic, his contract of indorsement would be voidable, though valid until avoided; but the other party would be bound if the indorser wished to hold him. (See, *ante,* "Contracts," §13.) For this reason, if an infant were to indorse a negotiable instrument, the title would be transferred at the time (see, *post,* Appendix A, Negotiable Instruments Law, §41), but if he subsequently avoided his contract of indorsement he would be reinstated to all his original rights as holder, including the right to recover the amount of the instrument from the party primarily liable if due, even though such party had paid the instrument in good faith to a subsequent holder; nor could such prior payment be recovered from the subsequent holder if the infant were the payee named in the instrument, as the party primarily liable not only admits the existence of the payee but also his capacity to indorse. [See, *post,* Appendix A, Negotiable Instruments Law, §§110, 111, 112(2).]

If an infant indorser, at the time of his disaffirmance, should have the consideration received for his indorsement,

it would be his duty to surrender it (see, *ante,* "Contracts," §16); and if the instrument meantime has been paid to a subsequent holder by the party primarily liable, the consideration received by the infant would equitably belong to the party making payment, but this condition of affairs would not be likely to exist.

If disaffirmance should occur before payment, it would be a sufficient defense to all who were parties prior to the infant's indorsement, when sought to be held liable by parties subsequent to such indorsement, as the disaffirmance makes the infant's indorsement, including his implied warranties and contract of indemnity, utterly void, and all subsequent titles derived through it fall with it. (See, *post,* §80.)

An indorsement of a negotiable instrument by a corporation lacking capacity to enter into such a contract will pass title although liability may not be incurred under the contract. (See, *post,* Appendix A, Negotiable Instruments Law, §41.)

A person holding a negotiable instrument in a representative capacity, such as executor, administrator, guardian or trustee, can indorse and transfer the instrument, though the estate in his charge is not bound by the indorsement, but he himself becomes personally liable, unless he is under obligation to indorse and has used terms negativing personal liability. (See, *post,* Appendix A, Negotiable Instruments Law, §74.)

NEGOTIATION—INDORSEMENT—CONSIDERATION.

59. An indorsement is presumed to be based on a consideration. This presumption is not conclusive except as to holders for value without notice.

Just as there is a presumption that a negotiable instrument was originally given for a consideration (see, *ante.*

§36), so there is a presumption that every contract of indorsement thereon was made for a consideration. (See, *post*, Appendix A, Negotiable Instruments Law, §50; see, also, Appendix B, Case No. 17.) This presumption may be rebutted as between immediate parties, but it is conclusive as to subsequent holders for value and in good faith. (See, *post*, §81.)

NEGOTIATION—INDORSEMENT—STRIKING OUT.

60. The holder of a negotiable instrument may strike out any indorsement not necessary to his title; but all indorsers after the one whose indorsement is so canceled are released from liability.

Although the holder of a negotiable instrument bearing indorsements does not have any right to change an indorsement in full to one in blank (see, *ante*, §49), he has a right to strike out an entire indorsement of any kind, as this amounts simply to cancellation of the contract made with that particular indorser; but such act would have the effect of discharging all holders subsequent to the one whose indorsement is canceled. [See, *post*, Appendix A, Negotiable Instruments Law, §§78, 201(3).] In striking out an indorsement, care must be exercised lest the holder injure his own title. Let us suppose a negotiable instrument, made payable to *A*, passes successively to *B*, *C*, and *D*, and *A*, *B*, and *C* have each indorsed in blank. *D*, the present holder, is at liberty to strike out either the indorsement of *B* or of *C* or both of them, leaving that of *A* alone. This does not affect *A*'s liability to *D* or to holders after *D*, as *A*'s blank indorsement was a contract, not only with *B*, but with each subsequent holder (see, *ante*, §56), and *D* is now the holder; hence *A* made a contract with *D* which is not affected by the cancellation of *A*'s contract with *B* and with *C*. *A*'s con-

tract with *D* was not dependent in any way on the other two contracts. *D* may also, if he wish, write, "Pay to the order of *D*" over *A*'s signature (see, *ante*, §49), as this does not change the legal effect of *A*'s contract with *D* in any way, *A*'s liability to *D* which before was implied, now becoming expressed. If, however, *D* should strike out the indorsement of *A*, leaving those of *B* and *C*, then *B* and *C* would be released from liability (see, *post*, §102), as it would not be equitable to hold them after depriving them of the right to hold *A*; and, further, *D* would cease to become a holder of the instrument and would occupy the position of an assignee merely. (See, *post*, §65.) The instrument would be without any valid indorsement and, on its face, would be payable to *A* alone just as it was originally delivered. If each indorsement had been in full, thus, if *A* had indorsed: "Pay to the order of *B*"; and *B* had indorsed: "Pay to the order of *C*"; and *C* had indorsed: "Pay to the order of *D*," each indorser signing his indorsement, it is evident that if *D* should strike out any one of these indorsements it would break the chain of his title and again leave him in the position of an ordinary assignee subject to all defenses.

NEGOTIATION—INDORSEMENT—INDEMNITY.

61. The contract of indemnity implied in an indorsement not qualified makes the indorser liable for any loss resulting from a dishonor of the instrument.

A bill of exchange is dishonored by non-acceptance when—

Duly presented for acceptance, which is refused or cannot be obtained.

Presentment for acceptance is excused and the bill is not accepted.

A negotiable instrument is dishonored by non-payment when—

Duly presented for payment, and payment is refused or cannot be obtained.

Overdue and unpaid, and presentment for payment is excused.

As was said *ante,* in §54, a general and ordinary indorsement of a negotiable instrument accomplishes three things. The first, to transfer title to the instrument, has been considered. The second is to indemnify subsequent holders for any loss resulting if the instrument be dishonored. (See, *post,* Appendix A, Negotiable Instruments Law, §116.) This part of the indorser's contract may be expressed though usually it is implied; but it will not be implied if the indorser's express contract indicates an intention not to indemnify, as in the case of a qualified indorsement. (See, *ante,* §51.)

A bill of exchange is dishonored when duly presented to the drawee for acceptance, and acceptance is refused or cannot be obtained; or a reasonable but unsuccessful attempt has been made by the holder to reach the drawee, or presentment is otherwise excused. (See, *post,* Appendix A, Negotiable Instruments Law, §§245, 246.)

Any negotiable instrument is dishonored by non-payment when duly presented for payment and payment is refused or cannot be obtained. Likewise, if a proper but unsuccessful effort has been made by the holder to obtain payment, an instrument is dishonored as soon as the date of maturity has passed without its being paid. (See, *post,* Appendix A, Negotiable Instruments Law, §143.)

Every general indorsement is subject to two implied conditions known technically as "presentment" and "notice"; that is, in order to hold the indorser on his implied

contract of indemnity, the holder, as soon as the instrument is due, must present it or cause it to be presented for payment by the party who is expected to make payment, and prompt notice of non-payment must be given by the holder to the indorser. If the instrument be a bill of exchange and it is dishonored by non-acceptance, notice of such non-acceptance must be given by the holder to the indorser. The steps necessary to make a proper presentment and the rules governing notice to an indorser will be more fully set forth, *post*, in Chapter VI.

In a facultative indorsement there is a waiver of one or of both of these implied conditions of presentment and notice. (See, *ante,* §51.)

If one joint indorser of a negotiable instrument should be compelled to indemnify the holder thereof beyond such indorser's equitable proportion, he is entitled to contribution, that is, to reimbursement from his co-indorser or co-indorsers for the amount in excess of his share. (See, *ante,* "Contracts," §10.)

The drawer of a bill of exchange enters into an implied contract of indemnity with the payee and with each subsequent holder thereof, similar to the implied contract of an indorser. (See, *ante,* §19.)

If a bill of exchange has been issued in a set (see, *ante,* §13), one part only should be indorsed, though all of the parts should be delivered along with the one indorsed. If one part should be indorsed to one person, and another to another person, indorsers of such parts are liable to each subsequent holder who suffers by reason of non-payment of the part he holds, although resulting from a prior payment of another part. (See, *post,* Appendix A, Negotiable Instruments Law, §312.) The drawer, however, is liable for non-payment of but one part only—the part first indorsed. (See, *post,* Appendix A, Negotiable Instruments Law, §311.)

NEGOTIATION—BY DELIVERY ONLY.

62. An instrument originally payable to bearer or indorsed in blank may be negotiated by delivery only.

A transferror by delivery only enters into an implied contract with his transferee which—

Transfers title.

Warrants the instrument.

As was said, *ante,* in §46, negotiation may be made either by indorsement or by delivery. Negotiation by indorsement has been considered in the preceding sections. In order to negotiate an instrument by delivery only, it is essential that it either originally was payable to bearer (see, Appendix B, Case No. 9), or that the last indorsement was in blank so that in effect it has become payable to bearer. (See, *post,* Appendix A, Negotiable Instruments Law, §60.)

Negotiation by delivery only results in an implied contract between the transferror and his transferee which, like that of an indorser, transfers the legal title; but the implied contract of a transferror by delivery only differs in other respects from that of a general and ordinary indorser. A transferror by delivery only warrants the instrument; but his warranties are not quite as extensive as those of a general and ordinary indorser, as will be seen from the following section. The transferror by delivery only, unlike an indorser, does not enter into an implied agreement to indemnify his transferee.

Another important distinction between an indorser and a transferror by delivery only is that the implied contract entered into by the transferror by delivery only is not made with anyone but his immediate transferee, while the implied contract of an indorser is made not only with his transferee

but also with each subsequent holder. (See, *ante*, §56, and, *post*, §63.)

If the transferror by delivery only should be an agent of the legal holder, he must disclose the facts, not only that he is acting simply as an agent but in addition must give the name of his principal; otherwise the agent will become personally liable as in the case of any transferror. (See, *post*, Appendix A, Negotiable Instruments Law, §119.)

NEGOTIATION—WARRANTIES.

63. **Every person negotiating an instrument, unless he indicates the contrary, impliedly warrants that—**

It is genuine and in all respects what it purports to be.

He has a good title to it.

All prior parties had capacity to contract.

If the transfer is by an unqualified indorsement, there is an implied warranty by the indorser that the instrument is, at the time of his indorsement, valid and subsisting.

If the transfer is by delivery only or by a qualified indorsement, there is an implied warranty by the transferror that he does not have knowledge of any fact which would impair the validity of the instrument or render it valueless.

An indorsement can be made for the sole purpose of giving a warranty.

The implied warranties given by an indorsement extend to each subsequent holder; but if negotiation is by delivery only, such warranties are not given to anyone but the transferee.

As stated, *ante*, in §§54 and 62, negotiation of an instrument, whether by indorsement or by delivery only, makes the transferror liable on some implied warranties. Three

of these warranties arise whether negotiation results from indorsement or from delivery only; namely, that the instrument is genuine, that the transferror's title is good, and that all prior parties were competent. (See, *post,* Appendix A, Negotiable Instruments Law, §115.) These warranties are implied because they are presumed to be the intention of the parties. When a person is offered what seems to be a negotiable instrument he is justified in assuming that it is just what it purports to be—a genuine instrument, and that he is not offered something which is a forgery, or which bears fictitious names, or has been altered, or which, for some other reason, is defective or worthless; otherwise it could not play the important part of money. (See Appendix B, Case No. 13.) A transferee in good faith has no expectation of acquiring a law-suit.

What was said *ante,* "Sales," §20, in regard to goods, applies with equal force to negotiable instruments. When a person offers to transfer title it amounts to an affirmation that he at that time possesses what he offers to transfer—a good title and that he has a right to transfer the subject-matter.

A person taking a negotiable instrument may not know anything about the parties prior to his immediate transferror, in which case he can rightfully assume that all transfers by former parties were by agreements which were binding, and not voidable for infancy or insanity, or unenforceable for bankruptcy, or void because a prior party was an alien enemy or a corporation which exceeded its powers or was under any other legal disability. If the holder of a negotiable instrument should lose his title by the disaffirmance of a prior party on the grounds of infancy (see, *ante,* §58), he can recover from his immediate transferror or from any indorser after the infant, upon this implied warranty that prior parties possessed capacity.

When a negotiable instrument is due and payment is claimed by the holder, the party who is sought to be held liable may set up some defense why he should not be required to pay it. This defense may relate to something which occurred at the time the instrument was made, such as lack of consideration, which, it is claimed, prevented the instrument from having any validity originally; or it may relate to something which arose afterwards, that is, admitting that the instrument was originally valid, the debtor claims that it has not continued so—that something occurred, such as payment to some holder before maturity, by which it ceased to be a subsisting obligation. The transferror of a negotiable instrument may or may not know of such existing defenses; but if the transfer is by an unqualified indorsement, a warranty by the indorser is implied that, at the time of his indorsement, the instrument is valid and subsisting, regardless of his ignorance of facts impairing its validity. [See, *post,* Appendix A, Negotiable Instruments Law, §116(2).] If he knew of such circumstances he might be liable for fraud as well as for a breach of his warranty. If, however, transfer is by delivery only or by a qualified indorsement, the transferror would not be liable if, at the time of the transfer, he was ignorant of any matters which affected the validity of the instrument. [See, *post,* Appendix A, Negotiable Instruments Law, §115(4).] That is, the indorser under an unqualified indorsement absolutely warrants that there are no defenses, known or unknown to him; an indorser under a qualified indorsement or a transferror without indorsement warrants that he does not *know* of any defense to the instrument.

It must not be forgotten that, under the rule stated *ante,* in §56, the implied warranties of an indorser are given not only to his immediate transferee but also to each subsequent holder; whereas the implied warranties of a transferror by

delivery only can be enforced by no other party than his transferee. (See, *post,* Appendix A, Negotiable Instruments Law, §115.)

Thus, if *A, B* and *C* successively indorse a negotiable instrument, the holder can sue any one of them for a breach of an implied warranty; but if the instrument was payable to bearer and passed through the hands of *A, B* and *C* without their indorsements, the party receiving the instrument from *C* could hold him on his implied warranties but could not hold *A* or *B* directly. If *C's* liability should be enforced by his immediate transferee, *C* could recover in turn from *B* on the implied warranties of *B* to *C;* and *B,* in turn, could recover from *A,* so that, indirectly, each transferror would be liable to the holder.

Another important point which must not be overlooked is that while an indorser without recourse cannot be called upon for indemnity if the instrument should not be paid at maturity (see, *ante,* §§51, 61), the mere fact that an indorser has added "without recourse" to his signature will not free him from the implied warranties of an indorser, as the part of an indorser's implied contract relating to warranties is entirely distinct from that relating to indemnity.

Of course an indorser, by an express written agreement, can negative the warranties which would otherwise be implied; and, on the other hand, he can annex warranties which are not implied.

Sometimes an indorsement is made for the sole purpose of warranting the genuineness of a particular indorsement. It most commonly occurs where the holder of a check is unknown to the bank on which it is drawn, in which case someone whose signature is known at the bank writes below the holder's indorsement, "Signature O. K." or something equivalent thereto, and signs it. The contract made by such an irregular indorsement does not extend any further than an undertaking that the particular signature or signatures referred to are genuine, and it is not a contract of indemnity.

To summarize from what has been said in the preceding sections, the following are forms of some of the various kinds of indorsements:

(Ordinary Indorsement In Blank.)
OSCAR F. MEREDITH.

(Absolute Indorsement In Full.)
Pay to CHARLES H. FROST or order.
FRANK L. DOUGLASS.

(Restrictive Indorsement In Full.)
Pay to JOHN W. CORNELL only,
for collection to my account.
IDA E. ROBINSON.

(Restrictive Indorsement In Full.)
Pay to JOHN A. CONRAD or order,
as Trustee of HELEN DEWEY.
DANIEL W. WESTERVELT.

(Conditional Indorsement In Full.)
Pay to JOHN N. OTT or order
on the completion of the Zacatecas and Genesee Railroad.
WILBUR F. BLACKFORD.

(Qualified Indorsement In Blank.)
Without recourse.
AUSTIN H. PARKER.

(Facultative Indorsement In Blank.)
Presentment and notice waived.
WARREN B. BUCKLEY.

The implied contract of a regular and general indorser in blank of a promissory note or of an accepted bill of exchange, if reduced to express terms, would read substantially as follows: "For value received, I hereby transfer my legal title to this instrument and to the whole amount called for therein. I promise to indemnify any subsequent holder, deriving title through me, for any loss caused him by reason of non-payment of this instrument, provided it be presented to the maker [or acceptor] on the day of maturity and due notice of its dishonor be given to me. I warrant that the instrument is genuine; that I have good title to it; that all

prior parties had capacity to contract; and that the instrument is now a valid and subsisting obligation."

The implied contracts of other indorsers would be similar, with modifications to suit the particular form of indorsement and the nature of the instrument indorsed.

ASSIGNMENT—KINDS.

64. An instrument, though negotiable, may be assigned as any other money-claim.

Assignment may be:

By Act of the Parties.

Voluntary.

Involuntary.

By Operation of Law.

The second method of transferring a negotiable instrument is by assignment, which is not so common a method of negotiation. If a negotiable instrument be assigned, it is treated as a mere money-claim; and the transfer is governed by the rules applying to assignments generally. (See, *ante*, "Contracts," §71 *et seq.*)

Assignment of a negotiable instrument may be effected by the act of the parties or of one of them, or by operation of law; and when resulting from the act of the parties it may be voluntary or involuntary.

ASSIGNMENT—VOLUNTARY.

65. A Voluntary assignment is one resulting from the act of both the transferror and the transferee.

Voluntary assignment requires participation by both the transferror and the transferee in an act which results in the

transfer. It may result from their deliberate intention to assign, or it may result from their doing something which transfers the instrument but which is not sufficient to constitute negotiation. Deliberate assignment is rare, usually occurring where the instrument is but a part of other property assigned, and the transfer is evidenced by a writing not on the instrument itself. If a transfer of a negotiable instrument be evidenced by a writing on the instrument itself, and there is any doubt whether it is an indorsement or an assignment, the former will be presumed. It is but reasonable to suppose that the parties intended the transfer to be made in the customary manner, and that the transferee was to possess full right to the instrument without being restricted to the limited rights of an assignee. (See, *ante,* §47.)

If a negotiable instrument payable to a designated payee or so indorsed that further indorsement is necessary to negotiate it, is delivered without indorsement with the intention of transferring title, the transferee, although taking such title as his transferror had, is merely an assignee. If the transferror had a defective title, the assignee obtains a like defective title. (See Appendix B, Case No. 14.) The assignor, however, would be liable on his implied warranties in regard to title and validity. (See, *ante,* "Contracts," §73.) Delivery without indorsement usually results from inadvertence, though indorsement might be withheld from fraud on the part of the transferror. (See, *post,* §72.) Whatever the reason, the transferee has a right to have the indorsement of his transferror, yet remaining an assignee and, as such, subject to defenses until indorsement is actually made. (See, *post,* Appendix A, Negotiable Instruments Law, §79.)

ASSIGNMENT—INVOLUNTARY.

66. Involuntary assignment of a negotiable instrument results from the act of only one of the parties to accomplish it.

The transfer of a negotiable instrument may result in some cases from the act of one only of the parties to accomplish it; and such a transfer might be accomplished even though opposed by the other party. The most common instance of involuntary assignment is by means of bankruptcy proceedings, under which the legal title to all negotiable instruments, along with the other property owned by the bankrupt, would pass to his trustee in bankruptcy to be disposed of as any other assets.

In some States, by statute, negotiable instruments are subject to garnishment.

ASSIGNMENT BY OPERATION OF LAW.

67. A transfer by Operation of Law is one resulting from the working of some legal principle or from a statutory provision, without any active steps being taken by either party to effect the transfer.

Title to a negotiable instrument will be transferred in some cases although neither party acts for that purpose; and sometimes the transferee may be in ignorance of the existence of the instrument. This results from the workings of some legal principle or by virtue of a statute. The most common instance of this is the death of the owner of a negotiable instrument, in which case its legal title passes to his personal representative (executor or administrator) who makes such disposition of it as the law may require.

When assignment results either involuntarily or by operation of law, the transferee, as in the case of any assignment, acquires such rights only as the transferror had, that is, a personal representative takes such rights only as the decedent had at the time of his death, and a trustee in bankruptcy has no rights superior to those of his bankrupt.

CHAPTER V.

DEFENSES.

68. Negotiability—Leading Characteristics.
69. Holder in Due Course—Who Is.
70. Holder in Due Course—Good Faith.
71. Holder in Due Course—Notice—Kinds—Actual.
72. Holder in Due Course—Actual Notice before Negotiation and Payment.
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74. Holder in Due Course—Constructive Notice—Overdue Instrument.
75. Holder in Due Course—Notice—What is not.
76. Holder in Due Course—Value.
77. Holder in Due Course—Presumption—Good Faith—Value.
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79. Kinds of Defenses.
80. Real Defenses.
81. Personal Defenses.

NEGOTIABILITY—LEADING CHARACTERISTICS.

68. One of the leading characteristics of a negotiable instrument is that some holders may be able to enforce it although prior holders might not have been able to do so.

The general common law rule is that a contract can be enforced only by the original parties thereto (see, *ante,* "Contracts," §70); and when others are allowed to enforce, or

to be held liable under, a contract made by others, such rights and liabilities are no greater than those of the original parties. Hence, one of the striking characteristics of a negotiable instrument is that it is, or at least seems to be, an important exception to this general rule of contracts, as it is possible for one person to enforce a negotiable instrument although some prior holder or holders might not have been able to do so; that is, certain defenses by the parties liable on a negotiable instrument, which could have been set up against some holders if they had retained the instrument, are not allowed against subsequent holders. (See, *post,* Appendix A, Negotiable Instruments Law, §96.) This Chapter will be devoted to a discussion of the rules which make one holder free from defenses to which other holders would be subject.

In one sense this liability of one holder of a negotiable instrument to enforce it when a prior holder could not is not an exception to the general rule of contracts, but results rather from the fact that each party assuming liability on a negotiable instrument makes as many different contracts as there are subsequent holders. (See, *ante,* §20.) Perhaps a better way to state it is to say that when a person places his signature on a negotiable instrument, he makes an offer to the public (see, *ante,* "Contracts," §24) which is accepted, thus completing a contract, by the act of any person receiving the instrument in good faith. As each such contract is independent of all others, although based on the same instrument, it follows that its terms cannot be affected by the terms of contracts made by the signer with former holders.

Thus, a negotiable promissory note signed by *A* is delivered to *B*, the payee, for the price of goods to be delivered by *B* to *A* the following day. *B* never delivers the goods to *A;* hence, *B* never could enforce the note, as *A* could set

up the defense of failure of consideration. *B*, however, indorses the note to C who knows nothing about the situation between *A* and *B*, and *C* pays *B* for the note. *C* can compel *A* to pay the note although *B* could not; *C* has taken the note free from the defense of failure of consideration. When *A* delivered the negotiable instrument to *B*, he not only entered into an agreement with *B* but in effect made an offer to pay the note to anyone who subsequently acquired it. *C* accepted this offer by acquiring the note, then and there completing a contract between himself and *A*. While the agreement between *A* and *B* lacked the element of consideration, this element was not lacking in the contract between *A* and *C*, *C* having altered his condition for the worse by paying *B* in reliance on *A*'s promise. It is not necessary for the promisor to receive the consideration. (See, *ante*, "Contracts," §28.) Of course *A* would have a right to revoke his implied offer; but revocation, to be effective, must reach the offeree before he has accepted the offer. (See, *ante*, "Contracts," §26.) If *C*, at the time the note was offered to him, was aware of the fact that it was not a valid obligation in *B*'s hands, the former implied offer by *A* to *C* would be impliedly withdrawn, and there would not be any better contract between *A* and *C* than between *A* and *B*, as the element of agreement would be lacking between *A* and *C*. By regarding the rights of subsequent holders of a negotiable instrument as based on direct negotiations with prior parties, the student in most cases will not have any difficulty in determining what those rights are, if he will refer to the elements required for an ordinary contract. (See, *ante*, "Contracts," §9.)

HOLDER IN DUE COURSE—WHO IS.

69. **To enable the transferee of a negotiable instrument to enforce it when his transferror could not, such transferee must be a Holder in Due Course.**

To be a Holder of a negotiable instrument, a transferee thereof must acquire it by negotiation.

To acquire a negotiable instrument In Due Course a transferee must take it under either one or the other of two conditions, as follows:

First, he must have received the instrument—
In good faith; and—
For value.

Second, he must have acquired the instrument from one who could have enforced it, provided the transferee himself was not a party to any prior transaction constituting a defense to the instrument by the party sought to be held.

As has been seen (*ante,* §21), the law is quite technical as to the requisites of an instrument classed as negotiable, and there is also some technicality required in the negotiation of an instrument; hence it is to be expected that when the law makes an exception to the general rule by allowing one person to enforce a contract which a prior party could not, a certain amount of technicality will be encountered.

There are a number of designations given to a person who has acquired a negotiable instrument under such circumstances as to be free from defenses, if any, which could be successfully urged against former holders. Some of the more common of these designations are, "purchaser for value without notice," "*bona fide* holder," "innocent indorsee," and "purchaser in the usual course of business." As the Negotiable Instruments Law uses the expression, "Holder in Due Course," that has been the one selected for use in this volume.

Technically the "holder" of a negotiable instrument is either the payee named in the instrument or one to whom the instrument subsequently has been negotiated (see, *post,* Appendix A, Negotiable Instruments Law, §2, "Holder" and "Bearer"; and, *ante,* §15); but as long as an instrument,

though negotiable, is retained by the original payee, the rules laid down in this chapter have little application, the instrument then being governed by the rules pertaining to an ordinary contract; hence a "holder," for the purposes of this chapter, is one who receives it by negotiation, that is, by endorsement unless transferable by delivery only. In any event delivery is required, as mere indorsement or a promise to deliver is not sufficient. Assignment transfers such rights as the assignor had, but nothing more. If the assignor had a right to enforce the instrument, the assignee may be able to enforce such rights through the assignor; but if there were any defenses available against the assignor, the assignee also is subject to them. (See, *post,* Appendix A, Negotiable Instruments Law, §97.)

For a transferee of a negotiable instrument to become a holder "in due course," something more is required than mere negotiation. A transferee is a holder in due course if one or the other of two conditions exists, namely, either that he acquired the instrument for value and in good faith, [see, *post,* Appendix A, Negotiable Instruments Law §91(3)(4)], or that he acquired the instrument from one who could have enforced it free from defenses. These are the two methods under which a person receiving money will be allowed to retain it as against some former owner claiming title (see, *ante,* §1); and negotiable instruments, playing as they do the part of money, are governed by the same rules.

Under the first method, both elements must concur. If the transferee of a negotiable instrument has taken it for a very valuable consideration, this would not avail him if he knew at the time that there was some existing defense; or if the transferee was in ignorance of defenses, he would not be a holder in due course if the instrument was negotiated to him without consideration.

As soon as a negotiable instrument reaches the hands of a purchaser for value without notice it is instantly purged of its impurities, so that subsequent transferees will take it free from defenses which existed before it reached the hands of such holder for value without notice, although such later transferee may have had notice of the defenses and did not part with value; that is, while a transferror of a negotiable instrument may be able to give a better title than he himself has, he does not transfer a worse one. With his transfer go all of his rights; or, as it sometimes is expressed, the transferee is subrogated to the rights of his transferror. Any other rule would interfere with the object of negotiable instruments—to enable them to play the part of money, as it might compel a person, having an instrument which he could enforce when due, to retain it.

There is one limitation on this last rule; if the instrument should again reach the hands of the person who participated in the act which constituted the defense, such defense will spring up against him and he cannot take advantage of the fact that his immediate transferror had an indefeasible title. (See, *post,* Appendix A, Negotiable Instruments Law, §97.)

To illustrate these rules, suppose a promissory note signed by *X* is made payable to *A* and delivered to him. Before it is due, *X* concludes he would like to pay it. *A* accepts payment, but *X* neglects to take up the note, and *A* then indorses the note to *B* for value, who is ignorant of its prior payment. *A* might do this dishonestly or inadvertently. *B* becomes a holder in due course by the first method named above, and can compel *X* to pay the note again when due. Of course *B,* if *X* refused payment, could hold *A* on the latter's indorsement, either on the implied contract of indemnity (see *ante,* §61), unless the indorsement was "without recourse" (see, *ante,* §51), or on *A*'s implied warranty that the note was a subsisting obligation (see, *ante,*

§63); likewise *X* if he paid the note a second time could recover from *A* on a *quasi* contract. (See, *ante,* "Contracts," §10.) *A* likewise might be liable to a criminal prosecution if he acted fraudulently. These remedies, however, might not be practicable, as *A* might have disappeared, or, if present, might be financially irresponsible. Let us suppose further that immediately after *A*'s transfer to *B, X* learns thereof, and tells everyone he meets about *A*'s act. Among others, *C* learns of it; yet, notwithstanding *C* knows all the facts, if he should acquire the instrument by negotiation from *B, C* could compel *X* to pay the note when due, although *C* had notice of *X*'s defense of former payment and may have taken the note from *B* without consideration, as *C* acquired, along with the note, *B*'s right to enforce payment. *B,* being a holder in due course, can make *C* a holder in due course. The reason for this rule arises from the fact that negotiable instruments, playing the part of money, should be as free as reasonably possible from impediments to circulation. If *B* could not transfer the note except to a person not having notice of *X*'s defense, it might be practically impossible for him to find such a person in financial circles. *B* might have taken the note with the intention of discounting it for cash to meet some payments coming due, and he might suffer great loss or possibly be ruined financially if he could not do so. The right to dispose of property is one of its most important incidents; and if *B* could not legally dispose of a note which he himself could enforce, he would be deprived of a valuable right. Everybody would be afraid to receive a negotiable instrument if it were possible that subsequent widespread information would prevent further transfer, and thus the object of negotiable instruments would not be accomplished. *C* has become a holder in due course under the second method mentioned above. As *C* can enforce the note he, in turn, could give title to *D*; and

thus it could pass from hand to hand regardless of the fact that each transferee had full knowledge of its prior payment, unless some defense should arise, such as loss or theft of the instrument, which required a transfer to someone in good faith and for value before it would be freed from such second defense. If, however, by subsequent circulation, this note should reach *A*'s hands again, even though he may give full value for it, he could not enforce it, nor could he dispose of it to anyone knowing the facts so as to enable his transferee to enforce it, though he could to one not knowing the facts and who gives value. *A* is not allowed to take advantage of his former wrong, by compelling *X* to make a second payment to him; likewise, theoretically at least, he is not injured by denying him the right to enforce it, as he has received double value—once from *X* and once from *B*, so that even if he has paid value to acquire the note a second time, he still has the amount formerly received from *X*, hence is not a loser by being denied further recovery on the note.

HOLDER IN DUE COURSE—GOOD FAITH.

70. Good Faith means absence of notice of defenses or equities of any kind which could be set up against a prior holder of the instrument.

When it is said that a holder in due course must have taken an instrument in good faith, it means that, at the time he parts with value for the instrument, he must not know or have reasonable means of knowing that the instrument is not a valid and subsisting obligation. Good faith, when applied to the transferee of a negotiable instrument, has the same meaning as when used in connection with the recipient of money, which is not quite the same as when used in ordinary transactions. Probably a better way to formulate the

rule would be to express it in the negative by saying that a transferee of a negotiable instrument is not a holder in due course if he receives it in bad faith. (See, *post,* Appendix A, Negotiable Instruments Law, §95.)

Sometimes the Latin equivalents are used—*bona fides,* meaning good faith, and *mala fides,* bad faith. *Bona fide,* meaning "in good faith," is pronounced in four syllables—*o, i,* and *e* long, and *a* as in "final," that is, bo-nah fy-dee, with the accent on the first and third syllables. It is not "bunny-fied."

HOLDER IN DUE COURSE—NOTICE—KINDS—ACTUAL.

71. Notice may be—
Actual.
Constructive.

Actual notice is knowledge, or means of knowledge to which the transferee closes his eyes.

Immediate parties necessarily have notice of defenses arising out of the transaction which led to the transfer of the instrument from one to the other. Notice, then, relates chiefly to transactions with which some prior remote party is connected.

Notice, in the law of negotiable instruments, is classified as actual and constructive; and it does not have quite the same meaning as when used in connection with some other legal subjects. Actual notice of a defense to a negotiable instrument, preventing good faith in a transferee, may range all the way from actual knowledge to actual ignorance. If a person have actual knowledge of a defense there is no question about notice; and on this point there is little to be said. It is evident that immediate parties (see, *ante,* §17), such as the drawer and acceptor of a bill, the maker and

payee of a note, or an indorser and his indorsee, have actual notice of any defenses arising out of their dealings with each other. Hence the question of notice can arise between remote parties only. Thus, if a negotiable instrument should pass successively to *A, B,* and *C, B* does not need to be told how he acquired the instrument from *A*; nor does *C* need to be told how he acquired it from *B*; but *C* may or may not know how *B* acquired the instrument from *A*. If *C* does know, or has good reason to know, that *B* stole the instrument from *A,* then *C* has actual notice of *B*'s defective title, and acquires no better title than *B* had.

A transferee is held to have actual notice of an existing defense to a negotiable instrument, though without actual knowledge thereof, if the circumstances under which he acquired it indicate bad faith on his part; and it is in these cases that the question of notice becomes difficult. In the law of negotiable instruments, as in the case of money, the mere fact that the circumstances surrounding the transfer are suspicious is not sufficient to constitute notice to a transferee, notwithstanding he could easily have made inquiry from parties readily accessible at the time the instrument was offered to him and he would have learned thereby of an existing defense, such as that the instrument had been lost, stolen, or paid. Even though failure to make such an inquiry might be designated as gross negligence, it is not alone sufficient to prevent enforcement of the instrument. Thus, a person might wonder how a tramp came into possession of a check; but as it is not impossible for a beggar or a thief to have good title to money, so a person to whom a negotiable instrument is offered is not required to presume that the person then in possession may not have good title thereto. The transferee's conduct must be equivalent to a wilful refusal to see what is apparent or to hear what is true. The mere fact that a negotiable instrument is offered

for a very low price might not alone be sufficient to constitute notice (see Appendix B, Case No. 15); for in times of financial depression a merchant might be expected to offer a very liberal discount on a note not due for some time, especially if the maker was a comparative stranger living at a distant point and his solvency was questionable. The fact that the instrument is badly torn has been held not to be notice of its cancellation. Of course good business should prompt a person to make inquiry in all such cases, so as to avoid possible trouble and litigation. A combination of suspicious circumstances, however, might raise such a very strong presumption that the transferror of a negotiable instrument did not have title thereto, as to amount to a certainty in the mind of the average person that the transferee acted in bad faith by deliberately avoiding knowledge. Suppose a stranger offered to transfer, for five dollars, a promissory note for $100 due the next day and signed by a responsible person whose place of business was next door and the offeree took the note without asking any questions. He could not successfully claim to have acted in good faith and to be without notice of a defense whose existence he could have discovered at once by going to his neighbor.

Notice to an agent is notice to his principal if received while representing his principal in the transaction during which the instrument is transferred (see, *ante*, "Agency," §61); but notice to the agent while engaged in his own affairs, or while acting adversely to his principal, is not necessarily imputed to his principal. Thus, where a promissory note was indorsed by the payee, which was a corporation, to a bank, which was also a corporation, knowledge by a director of the bank of the circumstances under which the note originally was given will not be imputed to the bank if such director did not have knowledge of the transfer to the bank until after it had occurred.

A person dealing with a partner or with an officer of a corporation might have notice from the circumstances which would prevent his being a holder in good faith. Thus, if a person should take a negotiable instrument, payable to a partnership, by an indorsement of the firm name made by one partner for an individual indebtedness of such partner to the transferee, the latter could not be said to have taken it in good faith if the partner had no right to transfer it. The transferee should have ascertained whether the partner had a right so to transfer it, and he has actual notice of all facts a reasonable investigation would have disclosed. The same principle applies to one taking a negotiable instrument, indorsed in the corporate name, from an officer of the corporation for a private debt of such officer. If, however, one partner wrongfully sign or indorse the firm name to a negotiable instrument, so as to make it payable to himself, and he then indorses it for his private debt, the circumstances then might not be so suspicious as to indicate bad faith on the part of the transferee, it not being unusual nor wrong for a firm to make a note payable to one partner, or *vice versa*.

HOLDER IN DUE COURSE—ACTUAL NOTICE BEFORE NEGOTIATION AND PAYMENT.

72. Notice of a defense received by a transferee either before the instrument is delivered to him with a proper indorsement, if indorsement be required, or before he has parted with value, will prevent him from being a holder in good faith.

If notice be received by a transferee of a negotiable instrument, after he has parted with a portion of the consideration for the transfer, he is a holder in good faith to the extent of the value so parted with, but

not a holder in good faith as to any value parted with thereafter.

To constitute the transferee of a negotiable instrument a holder in due course, he must be in ignorance of defects in his transferror's title not only at the time the negotiation is complete but also at the time the consideration is executed. If a negotiable instrument be transferred before it is due and there is some existing defense against the transferror at the time of the transfer, and the instrument requires an indorsement to pass title but such indorsement is not made, the transferee could not collect the instrument as long as it remains unindorsed, although he has taken it for full value and in ignorance of the defense. If he subsequently obtain an indorsement before maturity and before he learns of the defense, he can enforce payment; but if he should learn of such defense before he obtains the indorsement, he takes subject to such defense. Lack of indorsement, when one is necessary to give full title, usually results from inadvertence, though sometimes it results from the fraud of the transferror. (See, *ante,* §65.) In any event the transferror can be compelled to indorse, even though bankrupt, but, prior to such indorsement, the transferee remains an assignee with no greater rights against other parties during that time than the assignee of any claim would have; that is, he is subject to existing defenses, even though he does not know of them. (See, *post,* Appendix A, Negotiable Instruments Law, §79.) By giving notice to the debtor, however, he might escape future defenses.

Sometimes the transferee of a negotiable instrument receives it by proper negotiation and in ignorance of all defenses to it, but under a promise to pay the transferror for it later, in which case if the transferee, before making payment, should learn of the defense, he is not a holder in due course. It is possible for a transferee to be a holder in due course as

to a part of the consideration, and not a holder in due course as to the balance, as would be the case if he receives notice after a part payment; he is a holder in due course as to the amount so paid, but not a holder in due course as to any balance paid thereafter. (See, *post*, Appendix A, Negotiable Instruments Law, §93.) His remedy, if any, would be upon the implied warranties of an indorser. (See, *ante*, §63.)

HOLDER IN DUE COURSE—CONSTRUCTIVE NOTICE—MEANING.

73. Constructive notice means knowledge to be derived from the face of the instrument.

The Face of an instrument consists of both the front and the back thereof, and of papers attached to it.

There is one instance in which the law construes the transferee of a negotiable instrument to have notice of defenses thereto, and will not allow him to deny it, and that is where such defense is indicated on the face of the instrument. [See, *post*, Appendix A, Negotiable Instruments Law, §91(1).] The fact that the transferee is in actual ignorance of the defense will not avail him, as he is required to know the terms of the written contract which fixes his rights against a prior remote party.

While "face" is frequently used as meaning the front of an instrument, in its technical sense it means both the front and back and anything attached to the instrument. Thus, a transferee will be charged with notice of a part payment indorsed on the back although he did not turn the instrument over; hence, the importance of noting payments on an instrument, whether of principal or of interest. When an instrument is paid in full, it should be so marked, even though subsequently torn into fragments; and especially is this true if payment be made before the instrument is due.

It is important also for a transferee to examine an instrument on both sides before receiving it.

If the transferee of a negotiable instrument knows that it was in an incomplete state at the time of its delivery to his transferror, he has constructive notice if the blanks have not been filled as authorized by the signer, (See, *post,* Appendix A, Negotiable Instruments Law, §§33, 34.) Thus *X,* signing a promissory note in blank as to the amount, delivers it to *A* in order that *A* may obtain money thereon to pay a debt the exact amount of which is unknown to either of them but which each is sure will not be over $100. *X* instructs *A* to fill in the amount when he ascertains it but not exceeding $100. *A,* however, in *B*'s presence fills in the amount as $500 and delivers the note to him, in which case *B* could not recover on the note, as he is under a duty to ascertain *A*'s authority to fill in the amount inserted and cannot hold *X* if *A* exceeded his authority. (See, *post,* §81.)

In those States where agreements made on Sunday are void, a negotiable instrument bearing a date which fell on Sunday would give constructive notice of its illegality. (See, *post,* §80.)

There is, of course, no occasion for constructive notice if a transferee has actual notice of the facts. Thus, if he reads all there is on the instrument, he has actual notice of its terms and the rule regarding constructive notice does not have any application. Constructive notice, if it exists at all, exists at the very instant of the transfer of the instrument; actual notice, if it exists, is received before the transfer, although the prior interval may be short.

As was said, *ante,* in §51, a qualified indorsement does not give constructive notice that there are any defects in the instrument transferred or that the indorser supposes there may be some defect in his title. (See, *post,* Appendix A, Negotiable Instruments Law, §68.) An indorsement without recourse merely indicates that the indorser is not willing to assume responsibility for payment, and the indorsee is not prevented thereby from being a holder in due course. (See Appendix B, Case No. 17.)

HOLDER IN DUE COURSE—CONSTRUCTIVE NOTICE—OVERDUE INSTRUMENT.

74. The transferee of an overdue negotiable instrument has constructive notice of any defenses which might be set up against his transferror.

A negotiable instrument payable on demand is treated as overdue after the expiration of a reasonable time from its date. The circumstances of each case must determine what constitutes a reasonable time.

A check, when regarded as overdue, is designated as "stale."

There is a reasonable supposition that parties will discharge their contracts according to the terms thereof, hence, that a negotiable instrument will be paid when due. For this reason, the transferee of an overdue negotiable instrument has constructive notice of all defenses which could be made against his transferror, and takes it subject to such defenses, if any. [See, *post,* Appendix A, Negotiable Instruments Law, §91(2); see, also, Appendix B, Case No. 16.] The theory is that if an instrument be not paid when due, there may be some sufficient legal reason therefor, and that non-payment does not result from mere financial inability, or from failure of the holder to ask for payment; such a possibility is strong enough to prevent a transferee from being a holder in good faith if he has not made reasonable inquiry, from the party liable, why it has not been paid. It must not be supposed, however, that an instrument becomes invalid or non-negotiable as soon as the day of maturity is past, or that it at once becomes subject to all existing defenses. While a negotiable instrument transferred after it is due is subject to any defenses which might be made against the holder on the date of maturity or which afterwards arise, if there are no defenses available against the

holder at maturity the instrument can be transferred after maturity exactly as it could have been transferred before, giving the transferee good title until some new defense subsequently arises. Thus, suppose a promissory note, payable one year after its date and signed by *X*, is obtained by *A*, the payee, through fraud, so that *X* could always make the defense of fraud against *A*. *A* holds the note over a year; and, knowing that *X* will refuse to pay it on account of the fraud, *A* transfers the note to *B* for value. *B* taking the note after maturity does not acquire any greater right than *A* had, whether he took it without actual knowledge of the defense or not, as the fact that the note was overdue should have put him on inquiry to ascertain whether it was valid; hence he has constructive notice of everything an inquiry would have revealed. Suppose, however, *A* had transferred the note to *B* before maturity for value, and *B* took without knowledge of *A*'s fraud. *B*, being a holder in good faith, can transfer a good title at any time, even after maturity, so that a transfer to *C* after maturity would not make *C* subject to the defense of fraud, although he was aware of it when the note was transferred to him, and did not give value therefor. *C*, likewise, could give good title to *D*; but if *X* should pay *D* while the latter held the note, inadvertently leaving the note uncanceled in *D*'s hands, *D* could not give a good title to *E* although the latter acquired it for full value without knowledge of the payment, as every holder after *D* would have constructive notice of every defense arising after maturity.

An instrument payable in installments is held to be overdue, under this rule, as soon as any installment of principal is overdue; but the mere fact that interest is overdue is not constructive notice.

Where an instrument is payable at a fixed time, it is very easy to determine when it is overdue; but it is not so

easy to determine when an instrument payable on demand may be considered overdue. A negotiable instrument payable "on demand," "at sight," or "on call" becomes, by its terms, payable as soon as delivered; but if made payable "on demand after date" payment could not rightfully be demanded until the day following its date. As soon as payment has been properly demanded and payment is not made, a demand instrument becomes overdue as between the party liable and the holder who made the demand or anyone with actual notice. A part payment indorsed on an instrument would be evidence of a demand, making the instrument overdue as to the balance, unless there was an understanding that further payment was not to be made at once.

In a strict technical sense every negotiable instrument payable on demand would become overdue the next day after its delivery; but generally the intention of the parties is that such instruments are to remain in circulation for an indefinite time, the provision as to demand being intended merely for the convenience of the holder. Hence, if there should be a valid defense to an instrument payable on demand, the question arises, after what length of time is an instrument payable on demand to be regarded as "overdue" so as to give a transferee constructive notice of such defense. The only answer is that it is to be regarded as overdue after the expiration of a reasonable time (see, *post*, Appendix A, Negotiable Instruments Law, §92), and what is a reasonable or an unreasonable time must be determined from the circumstances. (See, *post*, Appendix A, Negotiable Instruments Law, §4.) If the instrument provide for the payment of interest at stated periods there is a strong presumption that the parties intended the instrument to remain in circulation for at least one of the interest periods. In one case it was held that a demand note providing for interest

which was paid monthly was not "overdue" at the end of eighteen months, so that a transferee at that time did not have constructive notice of a defense which could have been made by the maker against the transferror.

A check is necessarily made payable on demand (see, *ante*, §9); but it is reasonable to suppose that it may circulate for a time though not expected to do so indefinitely. When a check is so old as to have suspicion cast upon it and, like other demand instruments, to be regarded as overdue, thus giving a transferee constructive notice of defenses, it is designated as "stale." It has been held that a check one month old was not stale, and it has been held that a check five months old was stale; but the circumstances must determine whether the delay is unreasonable, and a decision in one case will not govern another unless the facts are similar. A check to which a defense cannot be made is perfectly valid although it may be years old, provided the statute of limitations has not run against it.

HOLDER IN DUE COURSE—NOTICE—WHAT IS NOT.

75. The fact that the consideration for a negotiable instrument is set forth thereon is not notice of some unknown defense connected with such consideration.

Notice of defenses to a negotiable instrument is not given by public records not read by a transferee.

Previous dishonor of a negotiable instrument not overdue, if not actually known to a transferee, will not prevent his being a holder in due course.

The fact that the consideration for a negotiable instrument is set forth on its face is not notice that there may be some defense arising from the transaction in which the instrument was given. (See Appendix B, Case No. 17.)

Thus, if a promissory note state that it was given for the price of goods sold, a transferee is not obliged to suppose that the goods may have been sold under an illegal agreement, or that the goods may not have been delivered, or that a warranty has been broken. (See, *ante,* §36.)

The rule governing transfers of interests in real estate —that a person has constructive notice of suits pending in courts (Latin equivalent, *lis pendens*) and of recorded instruments (see, *post,* Volume IV), does not generally apply to negotiable instruments. The fact that there is litigation over a negotiable instrument will not alone prevent a transferee, actually ignorant thereof, from being a holder without notice although such litigation related to a defense to the note. To have protected himself, the party bringing suit should have an order entered restraining the party holding the note at the time the suit was instituted, from negotiating it. Even this would not prevent a transferee being a holder without notice, but it would have given the party liable a remedy if the order were violated. Likewise, if a negotiable instrument is secured by a mortgage which is recorded with the proper public official, such registration will not alone be sufficient to give a transferee notice of any defenses arising from provisions in the mortgage if the negotiable instrument does not make any reference to the mortgage, and the transferee has not seen the record. A transferee of a negotiable instrument is not required to search the records of all the courts, and those kept by public officials in every jurisdiction in which the instrument may have been, before he can be sure that there are no existing defenses. A rule of that kind would throw such burdens upon transferees as to make the circulation of negotiable instruments impracticable.

There are a few exceptions to the rule that a transferee does not have notice from public records. If a person has been adjudged insane by a decree of court, everyone in the jurisdiction

is conclusively presumed to have knowledge of the lunacy and of the resulting incapacity of such person to enter into a contract. (See, *ante,* "Contracts," §18.) Likewise, a decree of bankruptcy may discharge a party to an instrument, unless he thereafter makes a new promise to pay. (See, *ante,* "Contracts," §93.) As everyone is conclusively presumed to know the law, it might be said that everyone has constructive notice of illegality indicated by the wording of an instrument, although actually ignorant that any law is violated. (See *post,* §80.)

Previous dishonor of a negotiable instrument will not alone prevent a subsequent holder from being one in due course; though if he were aware of such dishonor before he acquired the instrument, he would be put on inquiry to ascertain the reason therefor, and if he did not make reasonable inquiry he would take the instrument subject to any legal defense which he would have learned from an inquiry. As was said *ante,* §37, the holder of a bill of exchange may have an option of presenting it for acceptance at any time before it is due (see, *post,* §84); but a transferee of a bill of exchange not overdue is not required to presume that it may have been presented for acceptance; hence he may be a holder in due course notwithstanding the bill may have been presented for acceptance and acceptance refused, provided there is nothing on the face of the bill indicating that fact and the transferee does not have actual notice. [See, *post,* Appendix A, Negotiable Instruments Law, §91(2).]

Likewise, the holder of a demand instrument has the right to present it for payment at any time; but a demand for payment followed by a refusal to pay will not affect the rights of a subsequent transferee without actual or constructive notice of such dishonor, if enough time has not elapsed after the date of the instrument to make it overdue as to everyone.

HOLDER IN DUE COURSE—VALUE.

76. The holder of a negotiable instrument has acquired it for value if he has taken it for any legal, executed consideration sufficient to support any simple contract.

Such a consideration exists if the instrument—
Was taken in payment of a pre-existing indebtedness.
Is held as security.

A consideration is not sufficient which consists merely in a promise by the transferee to part with value, as long as it remains executory.

A holder in due course of a negotiable instrument must have taken it not only in good faith but also for value; that is, if, for any reason, the transferror could not have recovered from the party apparently liable, he could not give any greater right to one to whom he transferred the instrument without consideration, as by gift for example, although such transferee accepted it in good faith. As between such a transferee and the party having a defense to payment, equity is on the side of the latter. To deny a transferee without consideration the right to recover on an instrument does not injure him, he not being in any worse position financially as the result of such denial than before he took the instrument; on the other hand it would be an injustice to require payment from someone who equitably should not be required to pay. (See, *ante,* §1.) It is important, therefore, to know just what constitutes value when a negotiable instrument is transferred.

In some respects the law is quite liberal as to what constitutes value so far as constituting one a holder in due course is concerned, anything generally sufficing which would constitute an executed consideration for a simple contract (see, *post,* Appendix A, Negotiable Instruments Law, §51);

but, while the general rule of contracts is that an executory consideration, that is, a mere promise to do something in the future, is sufficient (see, *ante,* "Contracts," §28), this is not sufficient when other persons may be prejudiced and the promisee has not as yet sustained any actual detriment. The consideration must be executed, that is, the promise must be performed, in order to constitute the promisee a holder in due course. Thus, if the holder of a promissory note should indorse it under a promise by the transferee to pay for it in thirty days, and the transferee, at the time of delivery, supposes the transferror to be the rightful owner but learns the next day that the transferror had taken the note merely as an agent with no right to transfer it, the mere promise to pay, without payment, would not make the transferee of such dishonest agent a holder for value as against the principal of the transferror; though if the note had actually belonged to the transferror, the transferee's promise would have been sufficient, provided, of course, that there were no other defenses. Likewise, merely giving credit is not sufficient to make a transferee a holder for value. Thus, where a bank discounts a negotiable instrument and, instead of paying the proceeds to the transferror, simply places the amount to his credit by way of deposit to his checking account, the bank is not a holder for value, at least as long as it has not paid any checks of the depositor after the transfer.

The rules in regard to the sufficiency of an antecedent or pre-existing indebtedness when goods are sold apply with equal force to the transfer of negotiable instruments. If the transferee of a negotiable instrument takes it in payment of an indebtedness owing him, the transferee is a holder for value. (See, *post,* Appendix A, Negotiable Instruments Law, §51.) Thus it would not make any difference whether the transferee of a negotiable instrument took it in payment for a horse sold by him to the transferror at the time the

transfer is made, or whether the instrument is taken by the transferee in cancellation of an indebtedness from a sale of a horse on credit to the transferror a year ago. In each case the transferee takes the instrument for value. This point, having been discussed, *ante,* "Sales," §32, does not require further attention here.

A person taking or holding a negotiable instrument as security for another indebtedness, whether as a pledgee, a lienee, or whatever form the transaction may have, is a holder for value to the extent of the indebtedness secured. (See, *post,* Appendix A, Negotiable Instruments Law, §53.) Thus if *A,* having a promissory note for $1,000 signed by *X* due in one year, wishes to borrow $500 from *B* for ninety days, *A* might transfer the note to *B* as collateral security for the repayment of the loan of $500. *B* would be a holder for value at least to the extent of $500 and interest, if any. If *A* should subsequently borrow $100 more from *B* under an agreement that *X*'s note was to be security for that amount also, then *B* would become a holder for value to the extent, at least, of $600 and interest.

HOLDER IN DUE COURSE—PRESUMPTION—GOOD FAITH—VALUE.

77. There is a prima facie presumption that a person in possession of a negotiable instrument apparently negotiated in proper form is a holder in due course.

There is a *prima facie* presumption that the holder of a negotiable instrument is one in due course; that is, it is sufficient if the holder, bringing suit, produces the instrument in court or shows some reason why it cannot be produced, makes formal proof of the genuineness of the signatures of the parties he desires to hold liable and also the signatures necessary to his title from such parties unless a

transfer is proved by some other evidence, and proves presentment for payment and notice when such acts are necessary. (See, *post,* §82.) He is not required to show how he acquired the instrument. The burden is on the party sued to prove that the holder is not one in due course; but if such party shows that the title of any person who has negotiated the instrument was defective, then the party bringing suit must show that he himself is a holder in due course under either of the two methods mentioned, *ante,* §69. (See, *post,* Appendix A, Negotiable Instruments Law, §98.) Slight evidence on this point is sufficient unless contradicted.

It is presumed that there was a consideration for a negotiable instrument when originally delivered, and for each subsequent negotiation thereof. (See, *post,* Appendix A, Negotiable Instruments Law, §50.) This presumption is *prima facie* only between immediate parties but conclusive if the party seeking redress is a holder in due course. (See, *post,* §81.)

HOLDER IN DUE COURSE—PRESUMPTION—TIME OF INDORSEMENT.

78. An undated indorsement on a negotiable instrument is presumed to have been made before the instrument was overdue; but such presumption is not conclusive.

If an indorsment be dated, there is a presumption that the instrument was delivered to the transferee on that date; but such presumption is not conclusive.

Indorsements are seldom dated, but there is a *prima facie* presumption that an undated indorsement was made before maturity (see, *post,* Appendix A, Negotiable Instruments Law, §75); and there is a *prima facie* presumption that a dated indorsement was delivered on its date (see, *post,* Appendix A, Negotiable Instruments Law, §30), so that if an indorsement is undated or bears a date before maturity, the

transferee thereunder will be presumed to have received the instrument before it was overdue, and, hence, without constructive notice of defenses, unless the contrary be shown.

KINDS OF DEFENSES.

79. Defenses to negotiable instruments are—
Real or Absolute.
Personal.

A Real defense is one which can be made against all persons.

A Personal defense is one which arises from the agreement or conduct of some particular person, rendering it inequitable for him to enforce the instrument, but which cannot be set up against a holder in due course.

In the effort to impress the student with the fact that a holder in due course may be able to enforce a negotiable instrument although some prior holder might not be able to do so, the student frequently goes to the other extreme and supposes that a holder in due course is immune from every defense, whatever its character. This, however, is not the case. All of the law cannot be taught in one paragraph. Even if it could, the average human mind could not grasp it all at once. It is advisable to have one point impressed before taking up the next. While a holder in due course is free from many defenses, there are some which can be successfully made even against him, although the instrument may have passed through any number of hands and each holder has acted in perfect good faith and paid more than the instrument was apparently worth.

This naturally leads to a division of defenses to negotiable instruments into two great classes technically known as "real" and "personal," the former being those which can be made against any holder, and the latter being those which

may be made against certain persons but not against a holder in due course.

To express the rule in another form, real or absolute defenses are available against everyone, whether an immediate or a remote party, and whether a holder in due course or not, while a personal defense is available against an immediate party, and against a remote party not a holder in due course, but not against a remote party who is a holder in due course under the rules laid down in the preceding sections. Until an instrument gets into circulation there are no remote parties; hence prior to that time the distinction between real and personal defenses does not become important, the original parties being immediate. Real defenses are said to be so called from the Latin word *res* (thing) as they apply to the contract—the thing itself, regardless of any person (Latin, *persona*) who may have been a holder of the instrument at any time.

Sometimes a distinction is made between a "defense" and an "equity"—"defenses" relating to those matters which are designated above as "absolute defenses," and "equities" being those designated above as "personal defenses"; that is to say, a "defense," technically speaking, relates to something which, it is asserted, prevented a binding contract from ever having been made, while an "equity" admits a previous undischarged contract but urges some reason why it should not be enforced. It is more convenient, however, and more customary to designate all of these matters as "defenses" and to classify them as real and personal.

A real defense can be better understood and impressed on the mind by recalling the statement heretofore made in regard to one peculiarity of a negotiable instrument—that, if it circulates, it is more than the one original contract (see, *ante*, §68); it becomes a series of contracts—each party whose name appears on the instrument generally being found to be a party to an independent contract of some kind with each other party, whether prior or subsequent. (See, *ante*, §20.) Thus, if *X* sign a negotiable promissory note payable to the order of *A*, and it is indorsed successively by

A, B, and *C, X* has made a contract, not only with *A*, but with *B* and with *C*; and *A* has made a contract, not only with *X* and with *B*, but with *C* as well, and likewise *B* and *C* are each parties to contracts with each of the other parties. This results from the fact that whenever a person becomes a party to a negotiable instrument, he in effect makes an offer to the public, as it is called (see, *ante,* "Contracts," §24), which is accepted by anyone subsequently receiving the instrument in good faith, thus creating a contract, provided all the elements of a contract exist. As was stated *ante,* "Contracts," §1, not every acceptance of an offer results in a valid agreement; that is, an agreement is not necessarily a contract. Another principle of the law of contracts must be recalled—that a binding contract between two parties is not prevented merely because some third person may have acted improperly without the knowledge or consent of either party; so, in the above illustration, when *X* signs a negotiable promissory note payable to the order of *A, X* makes an offer to pay it to anyone to whom it may be negotiated who receives it for value and in good faith, and when *B* indorses the note to *C, C* accepts this offer by *X,* making a new contract quite independent of the original one between *X* and *A,* though based thereon, and *C* should not be and is not prejudiced by any acts of *B* of which *C* was ignorant at the time the latter took the note from *B*. If *C* knew, when he accepted the instrument, of any reason why *B* could not enforce it against *X,* then *X*'s prior offer to *C* would be impliedly revoked so that a binding contract would not be made between *X* and *C*—the element of agreement would be lacking. However, there might be something connected with the instrument which would entirely negative any implied offer, or the facts would indicate that, although an implied offer was made, some element of a binding contract was lacking, thus preventing either any contract at all or

resulting in a voidable or in an unenforceable contract. Thus, if a promissory note, negotiable in form, should bear what purported to be a signature, but such signature was a forgery, there never was an offer made to anyone by the person whose name appears to be signed; hence he cannot be bound by any number of subsequent attempted implied acceptances thereof though given by persons in good faith. In the illustration above, if the signature of *X* is a forgery, *X* never made any offer to *B*, nor to *C*; hence, an agreement never was entered into nor was a contract ever made with either, and *X* can set up the defense of forgery if any holder should sue him, though such holder be one for value and in good faith. If, however, *X* signed and delivered the note to *A* for the purchase-price of a "diamond" ring known by *A* to be glass, the fraud practiced by *A*, making his contract with *X* voidable, cannot affect the independent contract of *B* if the latter was ignorant of the fraud when his contract with *X* was complete by accepting the note through *A*'s indorsement.

A defense may relate to the original instrument as a contract, or it may relate to the transaction which led either to entering into the contract or to a subsequent transfer of the instrument; and such subsequent transaction may affect the party primarily liable or it may not. In the above illustrations *X*, the maker, is directly interested in the defense to the note; but suppose the note, being a valid contract in *A*'s hands, is indorsed by him and then lost, being found by *B*, who afterwards delivers it to *C* who takes it for value and in good faith. In this case *X* owes the money and, so far as he individually is concerned, is willing to pay any holder of the note. *A*, however, notifies *X* of the loss, after which *X* would not be justified in paying *B* or anyone not a holder in good faith, but he could not rightfully refuse to pay *C* or any subsequent party, and has no reason for not doing so. This defense of lack of title arising from non-delivery would

be available as a personal defense if *B* sued either *A* or *X*, but not available between *C* and *A* or *X*. Let us suppose the note was originally valid, but while it was in the possession of *B*, *X* paid *B* before maturity but neglected to take up the instrument, and *B* made his indorsement to *C* thereafter who received it for value and in good faith. Here *X* and *A* would be the only ones having a defense—that of payment, but which is personal, that is, available against *B*, but not against *C*, who is a holder in due course.

REAL DEFENSES.

80. Some of the more common real defenses are—

Forgery.
Lack of both actual and apparent authority of one signing as Agent.
Non-delivery of Incomplete Instrument.
Fraud in the Execution.
Illegality when the agreement is declared void by Statute.
Failure to affix revenue-stamp.
Infancy.
Adjudged Insanity.
Alien Enemy.
Bankruptcy.
Statute of Limitations.
Discharge after maturity.
Material Alteration, except as to original tenor.

All of the real defenses which anyone would be likely to encounter are set out above; and some of them are quite uncommon. Real defenses are based on principles of law which it would be against public policy to allow to be set aside in any case, otherwise it would lead to evasions and wrong-doing.

Forgery may arise either from the fraudulent signing of the name of another person, or from a fraudulent writing over a genuine signature. Forgery of a signature does not require any attempt to imitate the genuine one. If a person should be asked to sign his name on a blank piece of paper merely for the purpose of identification, the subsequent writing of a negotiable instrument over such signature would constitute forgery. Rights cannot be acquired against anyone whose signature is a forgery, as he is not a party to any such contract as the forged writing purports to be. (See, *post,* Appendix A, Negotiable Instruments Law, §42.) Any other rule would place every person with property at the mercy of everyone with criminal tendencies, as all the latter would be required to do would be to forge a negotiable instrument and then transfer it to someone who receives it in good faith and for value. A forged negotiable instrument is the same as counterfeit money. The indorser and also the transferror by delivery of a forged instrument would be liable on his implied warranty of genuineness and validity. (See, *ante,* §63.)

It is possible for a person to commit forgery although he writes his own name. Thus if a check payable to the order of "John Smith" should, before indorsement, be lost by him and the name of the finder should likewise be John Smith, an indorsement by the latter, knowing that he was not the person intended, would constitute forgery; but if such a check, intended for the first John Smith, should inadvertently have been mailed to the second and, in the rush of business, have been indorsed by the latter without his being aware of the error, the criminal intent necessary for forgery would be lacking.

A person paying a forged instrument, knowing it to be forged, might, in some cases, be deemed to have ratified it (see, *ante,* "Agency," §23); but, if he paid it under the supposition that it was genuine, he can recover his payment from the person to whom it was made. (See Appen-

dix B, Case No. 13.) To this general rule there are some exceptions. If the person paying is negligent in notifying the person to whom payment is made, so that recovery of the payment would result in loss to the person to whom payment was made, such payee being an innocent person, the right to recover is gone. The party paid, if notified promptly, might be able to recover from prior parties who transferred the forged instrument. Another exception to the general rule allowing recovery of payment of forged instruments, is where the signature of the drawer of a bill of exchange is forged. A drawee is supposed to know the drawer's signature (see, *ante,* §43), and cannot recover a payment made to an innocent holder, even though the latter might be notified promptly. (See Appendix B, Case No. 9.) The remedy of the party paying is against the person who made or wrongfully participated in the forgery.

Rights cannot be acquired under a forged indorsement, or one made by the wrong person. (See Appendix B, Case No. 18.) If the indorsement of a person holding a negotiable instrument is required to transfer title, a forged indorsement will not take away his rights, unless he is negligent in acting after discovery of the forgery. He can compel payment to himself although payment has previously been made in good faith to a holder under the forged indorsement. (See Appendix B, Case No. 12.)

Under a rule somewhat akin to that governing forgery, a person signing the name of another person to a negotiable instrument or by way of indorsement without either actual or apparent authority to do so, cannot create any rights against the person whose name is so signed; and it does not make any difference that the person dealing with the supposed agent thought there was authority. Likewise, it is immaterial whether the person attempting to act as agent did so in good faith or fraudulently; the person so acting

would be liable on his implied warranty of authority, and, if acting fraudulently, would be liable for deceit and perhaps criminally, though in any case he would not be liable as a party to the instrument as he has not attempted to act as such. (See, *ante,* "Agency," §54.)

As everyone is obliged to take notice of the scope of the business of a partnership (see, *ante,* "Partnership," §25), and as a partner in a non-trading firm does not possess apparent authority to bind his co-partners on negotiable instruments (see, *ante,* "Partnership," §28), no one could rightfully claim to be the holder in due course of a negotiable instrument to which the name of a non-trading firm was signed by one partner without authority; hence lack of authority in such a case would be a real defense.

As will be seen in the following section, the fact that the blanks in an incomplete instrument have not been properly filled after its delivery will not be a defense against a holder in due course (see, *ante,* §73); but if an incomplete instrument, never delivered, has been completed and transferred without authority, it is not a valid contract in the hands of anyone, except as to those whose signatures are placed thereon after completion. (See, *post,* Appendix A, Negotiable Instruments Law, §34.)

Another defense, somewhat similar to forgery, is what is known as "fraud in the execution" (see, *ante,* "Contracts," §59)—where, by some trick or artifice, a signature is obtained to a negotiable instrument without the signer having any intention to enter into such a contract, so that there never was a contract. Under such circumstances the signer is not liable, even to a holder in due course, unless he is guilty of negligence either at the time his signature was obtained or after he learned of it. If the signature so secured was an indorsement of an instrument that could not be negotiated without an indorsement, the signer's rights to

the instrument would not be affected. The only right of an innocent transferee of an instrument bearing a signature secured by such a trick, would be through the implied warranty of genuineness by some former transferror. The student must not confuse "fraud in the execution" with "fraud in the consideration" or fraud in the ordinary sense of the word. The latter, which is much more common, is a personal defense not available against a holder in due course, and will be considered in the next section. It exists where a person signs or indorses a negotiable instrument with the intention of becoming a party thereto, but he is induced to become a party as the result of some fraud in the transaction which led to his becoming an actual party to the instrument.

The general rule is that illegality cannot affect the rights of innocent persons, and, hence, illegality, as a defense to a negotiable instrument, is not generally available against a holder in due course; that is, as stated in the following section, illegality is, in most cases, a personal defense. There are, however, some evils which legislative bodies have regarded as being so serious that, in an effort to stamp them out, statutes have been enacted making agreements growing out of certain transactions or made under certain circumstances, utterly void even though innocent persons are affected. The theory is that the public good resulting from such statutes overrides private rights, the general benefit being regarded as of more importance than individual loss. If a statute expressly states that an instrument, though in form negotiable, cannot be enforced even by a holder in due course, the statute governs, making illegality a real defense in these few cases, throwing the risk on every transferee of such instruments, and leaving him to such remedy as he may have upon the implied warranties of the transferror. Whenever a negotiable instrument is void for illegality, an

instrument given as a renewal thereof is subject to the same defense.

The statutes most commonly found which make negotiable instruments utterly void in the hands of everyone relate to gambling agreements, usury, Sunday agreements, instruments issued by municipalities without proper action having been taken by officials, and instruments not bearing a revenue-stamp.

When a statute makes a gambling agreement void, such statute and the decisions based thereon rendered by the supreme court of such State must determine when an agreement comes within the terms of such statute. (See, *ante*, "Contracts," §50.)

Most States have statutes forbidding usury; and the penalty fixed in the different States for a violation of such a statute varies from making every usurious agreement void, down to a mere forfeiture of interest exceeding the legal rate. (See, *ante*, "Contracts," §49.) If a statute should make a usurious agreement utterly or partially void in the hands of everyone, usury would become a real defense; otherwise, it is a form of illegality not affecting a holder in due course. (See the following section.)

In those States whose statutes forbid the making of contracts on Sunday, a negotiable instrument made and dated on that day would be illegal, not only as between the original parties (see, *ante*, "Contracts," §48), but also in the hands of everyone, as the date would give constructive notice of its illegality. Whether an instrument which does not show on its face that it was delivered on Sunday could be enforced by a holder in due course, would depend upon the wording of each particular statute, the defense of illegality being real if the statute made the instrument void in the hands of everyone, but personal if the statute did not so provide. (See the following section.)

When instruments are issued by municipalities under authority of a statute, such statute frequently provides for formal action which must be taken by certain officials, such as submission to a vote, or notice by publication of an intention to issue; and sometimes there is a further provision in the statute that instruments issued without an observance of these formalities are invalid.

Sometimes a statute provides for affixing revenue-stamps to negotiable instruments (see, *ante,* "Contracts," §47); and whether the statute makes an instrument not bearing the requisite amount of stamps void, or merely unenforceable, absence of stamps would become a real defense available against every holder, as everyone, being conclusively presumed to know the law, has constructive notice, from the face of the instrument, of the violation of the statute. (See, *ante,* §75.)

A few defenses arise from lack of capacity of the party sought to be held liable, rendering his agreement either voidable or void. The most common instances of lack of capacity are infancy, adjudged insanity, and alien enemy. The contract of an infant is generally voidable (see, *ante,* "Contracts," §13), not void, remaining valid until the infant exercises his option to avoid it, whereupon it becomes void. This privilege to avoid his agreement extends to most contracts, including negotiable instruments. Any other rule would place an infant, owning property, at the mercy of every dishonest person; for, in that case, all that would be necessary to obtain such property would be to have the infant sign a promissory note and then dispose of it to someone for value without notice. This is one of those instances where two rules of law are in conflict and one of them must yield; and the courts uphold the one working the least hardship in most cases. A party dealing with an infant might be presumed to have actual notice of the incapacity,

though this would not necessarily be the case. Subsequent parties, although they may be ignorant of the infancy of a prior party and may have acted in perfect good faith, take the risk of avoidance, in which case the remedy would be upon the implied warranty of the transferror that all prior parties were competent. (See, *ante,* §63.) If an infant is an indorser he can avoid his contract of indorsement at any time, the situation then becoming the same as if the indorsement never had been made. He is entitled to the possession of the instrument, and all rights dependent on his indorsement are terminated. If the infant disaffirm his indorsement before payment of the instrument by the party liable thereon, his disaffirmance is a good defense to a suit brought by any subsequent holder against the party liable. (See, *ante,* §58.)

The rules governing the contracts of insane persons (see, *ante,* "Contracts," §18) apply to negotiable instruments. The general rule is that an insane person is bound to one ignorant of his incapacity and acting in good faith; hence insanity in such cases would be a personal defense, as is stated in the following section. If, however, by a proper proceeding in court, technically known as an inquisition in lunacy (Latin form, *de lunatico inquirendo*), a person has been adjudged insane, everyone in the jurisdiction is conclusively presumed to have notice of the decree. (See, *ante,* §75.) Any other rule would hold out a premium to ignorance and invite evasion of court orders. Hence, there could not be a holder in due course of a negotiable instrument executed or indorsed by an adjudged lunatic, and the defense of adjudged insanity could be asserted against every holder although in actual ignorance of the court proceeding —that is, adjudged insanity is a real defense.

If the defense of "alien enemy" is available at all (see, *ante,* §20) it is available against a holder in due course; that

is, it is a real defense, the benefit resulting to the public from holding such agreements void being superior to private interests. (See, *ante,* "Contracts," §21.)

Contracts originally and remaining valid sometimes become unenforceable; and, when a contract becomes unenforceable, it generally cannot be enforced even by a holder for value and in good faith, as he has constructive notice of the defense. The most common two instances of a contract becoming unenforceable arise under the bankruptcy act and statute of limitations. If the liability of a party to a negotiable instrument be discharged by bankruptcy proceedings (see, *ante,* "Contracts," §93) he is not liable to a subsequent holder for value, even though without actual notice; and when the statute of limitations has run against an instrument (see, *ante,* "Contracts," §103), the holder, conclusively presumed to have knowledge of the statute, would know from the date of the instrument when the statute became a bar.

Any negotiations between the party primarily liable on a negotiable instrument and the holder after maturity resulting in a discharge of the instrument itself as a contract (see, *post,* §101), is a real defense as to all subsequent holders, as they have constructive notice of all defenses existing or arising after an instrument is overdue. (See, *ante,* §74.) It does not make any difference how the discharge of the instrument is effected, whether by payment, release, rescission, or substitution, provided it is in legal form. Payment may be made in money or property or by the application of a counterclaim by agreement. If the party primarily liable is a holder of the instrument at or after maturity in his own right, the instrument is discharged. [See, *post,* Appendix A, Negotiable Instruments Law, §200 (5).] A release may be effected by a separate instrument in writing in proper form, or by the delivery of the

instrument to the party primarily liable; but an oral release without cancellation or delivery of the instrument would not constitute a defense. (See, *post,* Appendix A, Negotiable Instruments Law, §203.)

The acts which will discharge a party primarily liable will discharge a party secondarily liable (see, *ante,* §16); but there are some acts which will discharge a party secondarily liable although the party primarily liable is not discharged, such as tender (see, *ante,* "Contracts," §80) or an extension of the time of payment without the consent of the party secondarily liable. (See, *post,* §102.) When a party secondarily liable is discharged after maturity, the same rules apply to him as where a party primarily liable is discharged—the discharge is a real defense.

As was said *ante,* in "Contracts," §92, a contract is discharged by a material alteration made without the assent of all parties. If such alteration was made with fraudulent intent it would constitute forgery as well, and, logically, would be a real defense. Under the old rule, material alteration was a defense available against even a holder in due course; but under the modern rule (see, *post,* Appendix A, Negotiable Instruments Law, §§205, 206) material alteration has become a defense partially real, partially personal, as a holder in due course can enforce the altered instrument as it was originally issued. (See, *post,* §101; see, also, Appendix B, Case No. 19.) This is a more equitable rule, as it is quite unjust to punish an innocent party for the wrongful act of another; and it is no hardship for the party originally liable on the instrument to perform the contract he actually promised to perform. Thus, if a negotiable promissory note, calling for the payment of $500 at three per cent., is altered by some holder so that it appears to be a note for $2,500 at five per cent., and it is then taken by someone for value in ignorance of the alteration, such transferee can collect from the maker $500 at

three per cent. The person making the alteration and all indorsers thereafter would be liable on the instrument as altered, as they became parties to it in its altered form, and impliedly warranted that it is what it purports to be. (See, *ante,* §63.) "Spoliation," that is, a change make unintentionally by the holder or intentionally by a third person without the assent of the holder, does not affect any rights, but throws the burden on the holder of establishing how the change occurred.

PERSONAL DEFENSES.

81. Some of the more common personal defenses are—

Material alteration, as to original tenor.
Illegality when agreement is not declared void by statute.
Non-adjudged insanity.
Ultra vires act of corporation.
Want of consideration.
Failure of consideration.
Fraud in the consideration.
Duress.
Lack of actual if apparent authority of agent to sign.
Blanks improperly filled.
Diversion of accommodation-paper.
Non-delivery.
Violation of conditions.
Payment, release, rescission, or substitution, unless amounting to a discharge after maturity.
Concealed Suretyship.
Counterclaim.

Many personal defenses, that is, those which cannot be made against a holder in due course, were necessarily discussed in the last section in treating of real defenses; and in such cases little need be added in this section. Thus, a

material alteration is a personal defense to the instrument as it was before any alteration was made. (See Appendix B, Case No. 19.) In some cases a material alteration might be a personal defense to the instrument in its altered form. Thus, if a party to a negotiable instrument is negligent so that an alteration is easily made, he might be liable on the instrument as altered; for if he has not done what common prudence would dictate should be done and which easily could have been done, he should bear all resulting loss rather than some subsequent innocent holder. It is said to be an application of the rule that when one of two or more innocent persons must suffer a loss as the result of the wrongful act of another, the person whose act or negligence enabled the wrongful act to be committed should bear the loss. Negligence facilitating alteration may arise from leaving unnecessary blank spaces, from writing a portion of the instrument in pencil so that it is easily erased without detection, or by unnecessarily writing something in such a place that that portion of the instrument where it appears can be detached without causing suspicion. However, it must not be supposed that every time blanks are wrongfully filled, or a part of an instrument is removed, the parties thereon are liable in its altered form. The question is whether the party signing the instrument was negligent so that the alteration naturally followed and probably resulted therefrom. It would be impracticable to draw an instrument so as absolutely to prevent changes and additions; though it is good business for a person drawing many instruments of similar form to use paper which shows attempts to make alterations thereon, and to use mechanical or other devices to prevent changes, especially in amounts.

As stated in the last section, the general rule is that illegality in the consideration is not a defense against a holder in due course. To forbid a person, who has taken a nego-

tiable instrument for value and in good faith, from enforcing it because originally given in an illegal transaction, would be punishing the innocent and rewarding the guilty; and it is only in the few cases where a statute makes illegality a defense against every holder that it becomes a real defense. Thus, a promissory note given to suppress a prosecution for a crime, though illegal and invalid as between the parties (see, *ante,* "Contracts," §51), could be enforced by a holder in due course.

As also was said in the last section, usury might be made a real defense by statute; but, in most instances, it is a personal defense if concealed. Concealed usury exists where there is nothing on the face of the instrument to indicate it; for if the instrument on its face show usury, that is, provides for the payment of a rate higher than that allowed by statute, there could not be a holder in due course although a transferee had not noticed the rate of interest, or, if he had, did not know that it was forbidden by statute, as every transferee has constructive notice of everything appearing on the face of the instrument and is conclusively presumed to know the law. Probably the most common three methods of concealing usury are to include it in the principal, to antedate the instrument, or to make a separate agreement in regard to it. Thus, a note calling for the payment of $100 in one year without interest might be given for a loan of $50, so that while the note apparently does not draw interest, the maker actually has promised to pay interest at the rate of one hundred per cent.; or the note might call for the payment "one year after date," but bear a date six months prior to the time of its delivery so that the rate of interest is actually twice as much as it appears to be from the face of the instrument. (See, *post,* Appendix A, Negotiable Instruments Law, §30.) A note might promise to pay no more than the amount actually received by the maker from the

payee and provide for interest at a rate which is legal, but the maker has given the payee a "bonus," "commission" or "fee" or paid an extravagant price for an article "sold" by the payee at the same time, which was an evasion of the usury law.

Some additional instances of illegality in the consideration are enumerated in Volume I of this series, "Contracts," §47.

If a party to a negotiable instrument has not been judicially declared insane, he can be held liable by one taking the instrument for value without notice of the incompetency of such party. Even a party dealing directly with a lunatic might hold him if such party comes within the rule laid down *ante,* in "Contracts," §18.

As will be seen *post,* in Volume V, a corporation is created by a charter issued by some State, such charter defining the powers of the corporation, that is, stating what it is authorized to do. In addition to the express authority conferred, authority is implied to do whatever is reasonably necessary to carry out such express powers. Acts by the corporation which are within its express or implied authority are designated as *intra vires;* and everything beyond such express or implied authority is called *ultra vires.* Most corporations have either express or implied authority to incur indebtedness; and the general rule is that whenever there is authority to contract a debt, there is also authority to give written evidence thereof, and such evidence may be in the form of a negotiable instrument. Although having power to execute negotiable instruments, the corporate name might be signed to an instrument for some purpose beyond its authority, but this defense of lack of authority cannot be successfully urged against a holder in due course. (See Appendix B, Case No. 20.) The defense of *ultra vires,* when allowed, is for the protection of the stockholders of

the corporation, but they are not entitled to protection to the detriment of innocent persons when the wrongful act was done by the agents of the corporation directly or indirectly appointed by the stockholders.

As between the parties to any contract the general rule is that a consideration is required (see, *ante,* "Contracts," §28), and this applies to negotiable instruments and to every transfer thereof; but absence of consideration is a personal defense. (See, *post,* Appendix A, Negotiable Instruments Law, §54.) Consideration may have been absent when the instrument was originally delivered, known as want or lack of consideration—such as a promissory note based on a past consideration, or on a moral obligation, or given for the discharge of a void agreement; or there may originally have been a consideration which subsequently ceased to exist, known as failure of consideration. (See, *ante,* "Contracts," §89.) Failure of consideration may be total or partial; and the extent of a partial failure of consideration may be certain or uncertain.

Consideration is some detriment sustained by the promisee —the person to whom the promise is made, which usually consists in parting with value. This value, though usually passing to the promisor, need not do so (see, *ante,* §20); hence if *X* signs and delivers a promissory note to *A* as a gift, and *A* then transfers it before maturity to *B* who pays *A* its face value and does not know the circumstances under which it was originally given, *B* can compel *X* to pay although *A* could not. There was no consideration for the promise by *X* to pay *A*—no detriment sustained by *A;* but there was detriment sustained by *B* when he paid *A* and accepted the offer impliedly made by *X* to pay *B* (see, *ante,* §68), and it is not material that the detriment sustained by *B* did not inure to the benefit of *X*. (See, *post,* Appendix A, Negotiable Instruments Law, §52.) If *X* is compelled to pay *B* under the circumstances, he might be able to recover the amount from *A*, unless *X* acquiesced in the transfer, when the gift to *A* would become complete by de-

livery and, hence, irrevocable. When consideration fails, it is immaterial whether it was executed or executory. Thus, a promissory note given for goods to be delivered would be based on an executory consideration, which fails when the goods are not delivered as agreed. A note given for goods which have been delivered is for an executed consideration, which fails if the goods are taken from the buyer by a third person having some claim thereon. Whether consideration was originally lacking or subsequently fails, such absence of consideration cannot be set up against a holder in due course.

Fraud, except fraud in the execution as stated in the last section, and duress are personal defenses.

Where an agent has apparent authority to sign his principal's name to a negotiable instrument, the principal will be bound to a holder in due course although some prior holder may have known that the agent lacked actual authority. (See, *ante,* "Agency," §33; and, also, Appendix B, Case No. 20.)

Growing out of this rule of agency, because based thereon. is the general rule that each partner in a trading partnership has implied authority to bind the firm within the scope of its business (see, *ante,* "Partnership," §28), and certain officers in a corporation have apparent authority to bind the corporation within the scope of its charter. This apparent authority may, however, be greater than the actual authority possessed; but if a negotiable instrument, signed by a partner or by an officer having apparent though not actual authority, is transferred to someone for value who receives it in ignorance of the lack of actual authority, he can enforce it notwithstanding his transferror may have known of such lack of actual authority.

In connection with the subject of unauthorized acts by agents is the matter of improperly filled blanks, and also what is known as "diversion." It is not uncommon, although not good business, for a party to a negotiable instrument to sign in some capacity while the instrument is in an incomplete state, this incomplete state ranging all the way from

signing a blank sheet of paper to signing an instrument with one blank space only, left for the amount, for the rate of interest, for the time of maturity, or for some other term. This may result from lack of time on the part of the signer to write out the instrument in full when he affixes his signature, or because the signer does not know what terms can be obtained from the party to whom the instrument ultimately is to be delivered, and in either case the signer leaves the completion of the instrument to someone else. If the signer does not specify any terms, there would be implied authority to fill up the instrument in any reasonable way (see, *post,* Appendix A, Negotiable Instruments Law, §33); but usually the signer either expressly states how some or all of the blanks are to be filled, or else places a limit as to the amount, rate of interest, time, etc. If filled in accordance with his directions and within a reasonable time, he is liable; the difficulty arises when blanks are filled in a manner different from that authorized. Thus, a man borrowing $1,000 for three months at four per cent., being in a hurry, signs his name to a blank note and leaves it with the lender, in whom he has confidence. The lender would have authority to fill the note in accordance with the terms of the loan and not otherwise. He would not have any right to make the amount $2,000, nor the rate five per cent., nor the time two months, and if he did he could not collect on the instrument; but a holder in due course after it is completed can enforce it. (See, *post,* Appendix A, Negotiable Instruments Law, §§32, 33.) If, however, a transferee was aware that, at the time the instrument was delivered to his transferror, it contained blanks, the transferee is not a holder in due course if he omits to make inquiry which would have resulted in his learning that such blanks had not been properly filled. A person signing a blank sheet of paper without any intention of becoming a party to a contract

cannot be held liable by anyone on any writing made on the paper so that his signature appears to be that of a party to a negotiable instrument. Such action would be forgery if done with fraudulent intent, and would be governed by the rules given in the last section.

An accommodation party (see, *ante,* §16) sometimes directs that certain things be done, but such things are not done. This failure to obey instructions is known as Diversion; which may be material or immaterial. An immaterial diversion is one which does not prevent the instrument from substantially accomplishing the purpose for which it was given and the accommodation party is not affected thereby. Thus, where the accommodation party directs that the instrument be used to obtain money to pay certain debts, but the instrument itself is taken by the creditor as payment of those debts, the diversion is immaterial; and knowledge by a transferee of an immaterial diversion will not prevent his right to recover on it. A diversion becomes material if the instrument is given for a particular purpose which is not substantially accomplished, or the accommodation party has some interest in the application of the proceeds. Thus, if a promissory note is signed by an accommodation party to take up an old note, it would be a material diversion to discount it and to use the proceeds for other purposes. Anyone taking a negotiable instrument with knowledge of its diversion could not enforce it; but it could be enforced by a holder in due course.

The general rule is that a written contract does not become effective until delivered (see, *ante,* "Contracts," §24), and this rule applies both to the original delivery of a negotiable instrument, and to a subsequent acceptance or indorsement thereon, so far as the immediate parties are concerned; but a holder in due course can enforce a negotiable instrument even though delivery never was made by the original

party or by an indorser thereof. A valid delivery, however, is presumed until the contrary is shown. (See, *post,* Appendix A, Negotiable Instruments Law, §35.) Thus, a negotiable instrument snatched by the payee from the hands of the party making it before he is ready to deliver it, or a negotiable instrument which is lost or stolen after it is indorsed in blank, or which is payable to bearer, can be enforced by one acquiring it for value without notice of his transferror's lack of title. (See Appendix B, Case No. 19.) To come under the rule that a holder in due course can enforce an instrument although not properly delivered, the instrument must have been in a complete state at the time it was improperly acquired; for if the instrument was incomplete at that time, the defense is real (see, *post,* Appendix A, Negotiable Instruments Law, §34) as stated in the last section. Any holder completing the instrument without authority commits forgery. If a holder in due course can enforce a stolen negotiable instrument, it is evident that he can enforce one which actually was delivered, although wrongfully. Thus, delivery by an agent for his own advantage, of a negotiable instrument belonging to his principal, or delivery by a person of a note given to him as collateral security only, or wrongful delivery by a person holding a negotiable instrument in escrow, will enable a holder for value, ignorant of such improper delivery, to enforce it. Sometimes a negotiable instrument is delivered under an agreement that the transferee is not to transfer the instrument at all or not until after a certain time, or that notice of an intended transfer shall be given the party liable, or, if transferred, it will be offered first to designated persons. A violation of such conditions, or of any others not appearing on the instrument, cannot affect a holder in due course. (See, *post,* Appendix A, Negotiable Instruments Law, §35.)

As will be seen *post,* in §93, failure of a holder to perform the implied condition of giving notice of the dishonor of a negotiable instrument to the indorsers and the drawer thereof will not affect a subsequent holder in due course. (See, *post,* Appendix A, Negotiable Instruments Law, §188.)

As was said in the last section, the discharge of a negotiable instrument after maturity is a real defense; and it is immaterial how such discharge was accomplished. (See, *post,* §101.) It is a real defense, first, because, after the discharge, there is no longer any valid contract capable of being transferred; and, second, everyone has constructive notice of defenses to an overdue instrument. (See, *ante,* §74.) Sometimes, however, the party liable on a negotiable instrument attempts to discharge it by going through the form of discharging it, but technically does not discharge it. This may occur in two instances. First, the party liable may deal with someone who is not the holder of the instrument, and who does not have any authority to act for the holder. (See Appendix B, Case No. 21.) A negotiable instrument is supposed to circulate; and the party liable is not justified in any conclusive presumption that it remains in the possession of the person in whose hands he saw it last. The transferee of a negotiable instrument is not under any obligation to notify anyone of the transfer, as an assignee is required to do to protect himself, this freedom of transfer being one of the distinguishing features and advantages of negotiability. (See, *ante,* §5.) It is evident that if *X* signed a negotiable promissory note payable to *A* which *A* has negotiated and delivered to *B, X,* although acting in perfect good faith, cannot affect *B*'s rights by making a payment to *A* after such transfer, unless *A* was given authority by *B* to act for him. The same would apply to any form of discharge by *B,* as a release, rescission, or the substitution of another contract. Good business requires that a person, before making

any payment, either of principal or of interest, should demand to see the instrument to which the payment is to be applied; and such payment, if partial, and the date thereof should be endorsed on the instrument. From the standpoint of the holder it is advisable to have the party paying sign the notation of payment if the statute of limitations is likely to become important. (See, *ante,* "Contracts," §103.) If the payment is in full, the instrument should be delivered to the party making such payment (see, *post,* Appendix A, Negotiable Instruments Law, §134), and it should be marked "paid" so that it cannot cause future trouble. Tearing the instrument into many pieces might be effectual cancellation, though there is a case holding that where the pieces of a bill of exchange were pasted together and transferred to a holder in due course, he could enforce it, and that he did not have constructive notice from the appearance of the bill. Hence, it is better to mark an instrument as paid, even though it afterwards is mutilated or destroyed by burning or other means. Technically, an instrument is not discharged by any acts occurring before maturity, even though the party liable deals with the actual holder. (See, *post,* Appendix A, Negotiable Instruments Law, §314.) Thus, if *X* pays his negotiable promissory note to *A* before maturity while *A* holds the note (which, however, *X* could not do unless there was a provision in the instrument allowing it or *A* is willing to accept payment), *X* would be liable to any transferee before maturity who acquired the instrument for value and without notice of its prior payment. This subsequent transfer might result from leaving the instrument in the hands of the holder either through inadvertence or through faith in his promise to destroy the instrument, and the latter intentionally or inadvertently transfers it; or the party paying it might lose it after taking possession of it. The rules applying to parties primarily liable apply also to

parties secondarily liable so far as they are liable either to the last holder or to prior ones. (See, *post,* §102.)

Suretyship is said to be "concealed" where there is nothing on the face of the instrument to indicate it. Thus if a promissory note, payable to *A,* is signed by *X* and *Y,* but all of the money for which the note was originally given was paid by *A* to *X, A* would know that *Y* signed merely as security, but to everyone without actual notice, *Y* would appear to be primarily liable to the same extent as *X*; hence if *A* transferred the note to *B* who was not aware of the facts, *B* could treat *Y* in the capacity he appears to occupy on the note—a co-maker—the suretyship not being apparent from any examination of the instrument. There are some acts which may discharge a surety, but such defenses would not be available to a concealed surety as against a holder in due course. If *Y* had added "surety" to his signature, then every transferee would have constructive notice of the capacity in which *Y* signed although a transferee might not have read the instrument carefully (see, *ante,* §73); and *Y* might be discharged by a tender, or by an extension of time without his consent, or by a release of security which prejudiced him. (See, *post,* §102.)

A counterclaim is not a defense against a holder in due course. In determining whether a counterclaim is a defense in any case the technical distinction between set-off and recoupment must be borne in mind. (See, *ante,* "Elementary Law," §10.) Recoupment, growing as it does out of the transaction in which the instrument was originally given or was subsequently transferred, and being equivalent to failure of consideration, is a personal defense. If a transferee had notice of such a counterclaim he would be denied recovery to the extent of the amount thereof. Thus, if a promissory note be given for the purchase-price of goods,

a breach of warranty might give rise to a claim which could be recouped and would furnish a good defense against anyone with notice. A set-off, arising as it does from some collateral transaction, is not necessarily a defense even to an overdue negotiable instrument, although the holder of the claim regards it as payment and would set it up if an action were brought against him on the instrument and the transferee was aware of the existence of such counterclaim at the time he acquired the instrument. A transferee is not obliged to presume that every set-off will be applied upon the particular instrument he acquires. As a set-off is an independent claim, a transferee, in the absence of actual notice to the contrary, is justified in the supposition that it will remain an independent claim and be settled as such. There should be some further action between the claimant of the set-off and the holder of the instrument, by which such counterclaim is to be regarded as payment (see, *post,* §101), before the instrument can be regarded as discharged, a mere unexecuted intention by one party being insufficient. Thus, if *A* holds a promissory note signed by *X* for $100, the mere fact that *X* has rendered services for *A* since the note was given and the value of such services is $100 would not alone prevent *B,* a transferee of the note, from enforcing it against *X,* although *B* was aware of *X*'s claim at the time of the transfer. If, however, there had been an express or an implied agreement between *A* and *X* that the latter's services were to be applied in discharge of the note, *B,* having knowledge of such arrangement, could not acquire any rights against *X*; and a transferee after maturity would have constructive notice of any such arrangement if made. (See, *ante,* §74.)

CHAPTER VI.

PRESENTMENT AND NOTICE OF DISHONOR.

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CONDITIONS IMPLIED—INDORSER—DRAWER.

82. The liability of a general indorser of any negotiable instrument, and of the drawer of a bill of exchange, to indemnify any subsequent holder for loss resulting from dishonor of the instrument, depends upon performance by the holder of the implied conditions of—

Presentment, which must be promptly and properly made; and,

Notice, which must be promptly and properly given.

Non-performance of these conditions, unless excused or waived, prevents recovery from a general indorser or from a drawer, not only of indemnity but also of the original consideration for the transfer.

As was said, *ante,* in §61, one of the terms of the contract implied from a general indorsement of a negotiable instrument is that the indorser will indemnify each subsequent holder for any loss resulting from dishonor, provided the proper steps have been taken. (See, *post,* Appendix A, Negotiable Instruments Law, §116.) This implied term in his contract makes a general indorser's liability secondary, and his promise to indemnify conditional. The implied conditions are that the holder shall make prompt and proper presentment (see, *post,* Appendix A, Negotiable Instruments Law, §130), and shall give prompt and proper notice of dishonor to the indorser. (See Appendix B, Cases No. 27 and 30.) As soon as this is done the holder has an immediate right of recourse to all prior parties secondarily liable on the instrument. (See, *post,* Appendix A, Negotiable Instruments Law, §144.) It must be recalled that a general indorsement is intended to accomplish three things —to transfer title, to indemnify, and to warrant (see, *ante,* §54); and it is the second part of the indorser's contract that is considered in this chapter. Presentment and notice are based on the theory that indorsers have a right to indulge in the presumption that the instrument, on which they are parties, will be paid by someone else; and they are justified in dismissing the matter from their minds if not promptly informed that such is not the case. Presentment in a proper manner is required so as to afford, to the party primarily liable, means for doing what he reasonably may be expected to do and what in most cases he does do, thus relieving indorsers from liability. The law does not make any exception in individual cases, but presumes damage to have been

occasioned to every indorser if the holder does not take the requisite steps, even though actual damage has not resulted. The rights of a drawer of a bill of exchange are similar to those of an indorser and the requirements of presentment and notice apply to a drawer the same as to an indorser. (See, *post,* Appendix A, Negotiable Instruments Law, §111.)

In a bill of exchange, the drawer expects the drawee to pay it, as theoretically the drawee owes the drawer (see, *ante,* §11); but technically the drawee is not a party to the instrument until he accepts it, whereupon he immediately becomes the party primarily liable to all other parties. (See, *ante,* §37.) An accepted bill of exchange, then, is very much like a promissory note made by the acceptor in favor of the payee, the drawer occupying a position similar to that of the first indorser of a promissory note evidencing indebtedness of the drawee to the drawer. On the other hand an indorsed promissory note is in the nature of a bill of exchange. The payee of the note has a claim against the maker which, by his indorsement, the payee directs the maker to pay to the transferee, the transferee thus being substituted for the payee, and the original payee then occupying the position of a drawer of a bill of exchange on the maker of the note; and so each indorsement in turn substitutes a new payee, and each subsequent indorser becomes in effect the drawer of a bill of exchange on the maker of the note, which is accepted before it is delivered to the transferee. (See, *ante,* §53.)

The implied promise to indemnify is not made by an indorser without recourse. It is, however, one of the terms in a facultative indorsement; though one or both of these implied conditions are waived. (See, *ante,* §51.) The drawer of a bill of exchange (see, *post,* Appendix A, Negotiable Instruments Law, §111), and an acceptor *supra* protest (see, *post,* Appendix A, Negotiable Instruments Law, §284), each make an implied contract of indemnity (see, *ante,* §19) similar to that of a general indorser, unless there is an express stipulation to the contrary.

If a bill of exchange is drawn in a set and two or more parts are negotiated to different holders in due course, the indorsers are liable on each part they have indorsed (see, *post*, Appendix A, Negotiable Instruments Law, §312); but the drawer would be liable only to the holder whose title first accrued. (See, *post*, Appendix A, Negotiable Instruments Law, §311.)

Upon failure of the holder of a negotiable instrument to perform the two implied conditions of presentment and notice, unless excused or waived by circumstances which will be considered later (see, *post*, §§96, 97), the right of indemnity is gone forever (see Appendix B, Case No. 22); and when the right of indemnity has been so lost, the holder cannot resort to the original consideration, as sometimes is the case when a contract becomes void. (See, *ante*, "Contracts," §92.)

Thus, if the promissory note of a third person has been indorsed for the purchase-price of a horse purchased by the indorser from his transferee, and such transferee fails to make presentment of the note to the maker for payment when due and to give prompt notice to the indorser of the maker's default, the transferee not only has lost the right to recover from the buyer on his indorsement but he cannot ignore the note and recover on an action for the unpaid purchase-price of the horse.

The drawer and indorsers of a foreign bill of exchange annex a third implied condition to their contracts of indemnity in addition to those of presentment and notice, and that is, upon dishonor of such a bill, protest must be made. Protest, which is a solemn statement made by a Notary Public, is the subject of §95, *post*.

The implied conditions of presentment and notice are not annexed to an indorsement of a non-negotiable instrument.

PRESENTMENT—WHAT IS.

83. Presentment is exhibiting a bill of exchange to the drawee for acceptance, or to the drawee or acceptor for payment; or exhibiting a promissory note, to the party primarily liable, for payment.

Presentment is a technical term meaning the production of any negotiable instrument for payment or of a bill of exchange for acceptance.

PRESENTMENT FOR ACCEPTANCE.

84. The holder of a bill of exchange has a right to present it for acceptance; but such presentment is optional unless the bill—

Is payable at a designated time "after sight" or is otherwise so worded that presentment for acceptance is necessary to fix the time for payment.

Expressly stipulates therefor.

Is drawn payable elsewhere than at the residence or place of business of the drawee.

Presentment of a bill of exchange to the drawee for acceptance is requisite in three instances: first, when necessary to fix the maturity of the instrument; second, where the bill expressly stipulates for such presentment; and, third, where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. (See, *post,* Appendix A, Negotiable Instruments Law, §240.) In all other cases presentment for acceptance is optional.

If a bill of exchange is payable "thirty days after sight," or "thirty days after demand," it is evident that the thirty days cannot begin to be computed until the bill has been

seen by, or a demand made on, the drawee. Without presentment the bill never could have a day of maturity; but if payable "thirty days after date," the day of maturity is certain without presentment for acceptance, and the holder might wait until that day arrives and then present it for payment. The drawee, however, before acceptance, is not under any contractual obligation to the holder, and, so far as the holder is concerned, the drawee has a right to refuse to pay the bill. (See, *ante,* §37.) It might be very important for the holder to know definitely before the time of payment arrives, whether he can rely on payment at the proper time by the drawee, so that he can govern his own business affairs accordingly; hence he has the option, at any time before the bill is due, to present the bill for acceptance, and it is good business for him to do so. If acceptance is not given, the holder has his remedy at once against the drawer and indorsers upon giving them prompt notice of such dishonor.

It is evident that if a bill of exchange, although payable at a fixed future time, contains an express provision for presentment, such presentment is requisite in order to hold the drawer and indorsers liable in event of dishonor; though such an express provision is not customary.

If a bill of exchange, though payable at a fixed future date, is drawn payable elsewhere than at the residence or place of business of the drawee, it is quite possible that if he is not aware that the bill has been drawn he may not have funds at the designated time and place though desiring to make payment; hence it is but just, in such a case, to give him warning by making presentment for acceptance, and the drawer and indorsers are not liable if such presentment is not made. This condition of affairs, likewise, is not common.

A promissory note is not presented for acceptance, the maker having promised to pay it. (See, *ante,* §9.)

PRESENTMENT—BY WHOM MADE.

85. Presentment of a negotiable instrument should be made by the holder thereof or by his agent.

If the holder, at the time presentment should be made, is a pledgee, he should make presentment.

If the holder dies before the time of presentment arrives, presentment should be made by his personal representative.

Indorsers and the drawer who have acted in good faith have a right to suppose that others will in turn do what is expected of them; hence indorsers and the drawer usually do not expect to be required to pay the instrument to which they are parties, and sometimes they seek to evade liability. As they are not absolutely bound until the proper steps have been taken to fix their liability, it becomes important to know just what is sufficient performance by the holder of his duty in this respect—by whom, where, when, to whom and how shall presentment be made; and to whom, by whom, when, how and where shall notice be given.

Presentment of a negotiable instrument for acceptance or for payment should be made by the person who is the holder thereof at that particular time, though it is not requisite that presentment be made by the holder in person; it may be, and usually is, made by an agent having authority from the holder for that purpose. [See, *post,* Appendix A, Negotiable Instruments Law, §§132(1), 242.] Such authority may be given orally; and it frequently is implied, as in the case of partnerships and corporations and by deposits in banks. Anyone having lawful possession of the instrument for the purpose of collection has implied authority to make presentment. If a negotiable instrument is held by two or more as partners and one of them dies, the sur-

viving partner or partners should make presentment. (See, *ante,* "Partnership," §28.)

If the holder at the time presentment is necessary is a pledgee, that is, holds the instrument as security for the performance of some other act, he is under a duty to make such presentment, being responsible for any loss which results from his negligence in this respect.

If an individual holder has died, presentment should be made by his personal representative (executor or administrator.)

PRESENTMENT—WHERE MADE.

86. If a negotiable instrument specifies a place of payment, such place is the proper one for presentment for that purpose, in order to hold indorsers and the drawer.

If a place of payment is not specified but the address of the party to make payment is given in the instrument, the proper place for presentment for payment is at such address.

If a place of payment is not specified in a negotiable instrument nor any address given, presentment for payment is properly made at the usual place of business or of residence of the party to make payment.

In any other case, presentment for payment to the party in person who is to make payment, wherever he can be found, is properly made; or if he cannot be found, presentment for payment at his last known place of business or of residence is proper.

Presentment for acceptance would be governed by similar rules.

Presentment must be made at a proper place. [See, *post,* Appendix A, Negotiable Instruments Law, §132(3).] If

an instrument expressly specifies the place of payment, presentment for payment at that place is sufficient [see, *post,* Appendix A, Negotiable Instruments Law, §133(1); see, also, Appendix B, Case No. 23], although it is known that the party is not there or although the place is closed. Presentment, in such cases, is merely performance of the implied condition of the contract of the indorsers and of the drawer. If, however, the place designated is both a particular location and a particular business and the latter has moved, presentment for payment should be made at the new locality also, if it can be ascertained without unreasonable trouble. Thus, if the place of payment be the "First National Bank at No. 1 Kenmore Av.," and the holder finds No. 1 Kenmore Av. closed, but a sign announces that the bank has moved across the street, presentment for payment should be made at the latter place as well. If the instrument provide for payment at any one of several places, presentment for payment is sufficient if made at any one of them, as, for illustration, an instrument payable "at any bank" in a designated place. If the parties, by previous oral agreement, have stipulated as to the place of presentment, presentment at such place will be sufficient if it does not change the express terms of the instrument.

If a place of payment is not specified in a negotiable instrument, but the address of the person to make payment is given therein, it is a reasonable inference that payment is intended to be made there and presentment for payment at that address will be sufficient [see, *post,* Appendix A, Negotiable Instruments Law, §133(2)] although the party sought is not found there. However, it would be good business in all these cases to present the instrument to the party primarily liable in person if he is known to be in another place and is accessible, in addition to making formal presentment at the other places.

If a negotiable instrument specifies neither a place of payment nor an address, presentment should be made at the usual place of business of the party liable, if he have one, or, if not, at his place of residence. [See, *post,* Appendix A, Negotiable Instruments Law, §133(3); see, also, Appendix B, Case No. 25.] If such place of business or of residence is not known, the place of date may afford some clue, and all reasonable means should be exhausted to locate his place of business or his residence. It is better to make unnecessary effort to locate the party sought than not enough; directories, if any, should be consulted, and diligent inquiry should be made from those who might be able to furnish information.

If, after all reasonable means have been used, the place of business or the residence of the party to make payment cannot be ascertained, presentment to him in person at any place will be proper if he can be found; otherwise, presentment will suffice if made at his last known place of business or residence. [See, *post,* Appendix A, Negotiable Instruments Law, §133(4).]

The rules governing the place for presentment for acceptance would be similar to those governing the place of presentment for payment; but it must be borne in mind that the place of payment is not necessarily the place of acceptance. Payment is made where the money is; acceptance may require personal attention. The fact that a bill of exchange is made payable at a designated place which is not a place of business or the residence of the drawee, does not indicate that such place would be a proper place for presentment for acceptance; but if the bill should specify the place where it is to be presented for acceptance, or should give the address of the drawee, presentment for acceptance at such places would be sufficient. Generally, presentment for acceptance should be made at the place of business of the drawee or at his residence

PRESENTMENT—WHEN MADE.

87. To hold indorsers and the drawer liable for dishonor, presentment must be made in accordance with the rules which follow.

Where presentment of a bill of exchange for acceptance is necessary, such presentment must be made within a reasonable time.

Where presentment of a bill of exchange for acceptance is optional, it must be made, if made at all, before maturity.

Presentment for acceptance cannot be made on Sunday or other holiday, or on Saturday afternoon.

Presentment for payment of a negotiable instrument not due on demand must be made on the day it falls due.

If the day of maturity of a negotiable instrument falls upon Saturday, Sunday or other holiday, it is payable on the next succeeding business day.

Presentment for payment of a negotiable instrument payable on demand must be made within a reasonable time after its issue; except that such presentment of a bill of exchange is sufficient if made within a reasonable time after the last negotiation thereof. Demand may be made, at the option of the holder, on Saturday before noon, but not on Sunday or any holiday.

Presentment of any kind must be made at a reasonable hour.

Where presentment is made at a place of business, reasonable hours are those generally observed by persons engaged in similar occupations in that locality.

Where presentment is made at a residence it must be made during "waking hours."

Presentment made at a proper time is sufficient, although the party sought was absent at that particular time.

If a bill of exchange, properly presented for acceptance, is dishonored by non-acceptance, presentment for payment is not necessary.

Presentment for payment is not necessary to hold the party primarily liable on a negotiable instrument.

If the party primarily liable on a negotiable instrument payable at a special place, has funds there available for that purpose, such ability and willingness are equivalent to tender of payment upon his part.

The law has fixed the rules for the time of presentment, which must be observed, or indorsers and the drawer will be discharged from their implied contracts of indemnity for any dishonor. Where presentment for acceptance is requisite, presentment must be made within a reasonable time. (See, *post,* Appendix A, Negotiable Instruments Law, §241.) It would be a hardship to prolong the liability of the drawer and of the indorsees, if any, indefinitely; otherwise they might lose an opportunity of protecting themselves if the drawee did not accept as they expected.

Where presentment for acceptance is optional, the holder, if he elects to make such presentment, must make it before the bill is overdue. (See, *post,* Appendix A, Negotiable Instruments Law, §242.)

Where the maturity of a negotiable instrument is certain, it must be presented for payment on the day it falls due. (See, *post,* Appendix A, Negotiable Instruments Law, §131. See, also, Appendix B, Cases No. 23 and 30.)

Where an instrument is payable "on demand," "at sight," "on call," or contains some equivalent phrase, it must be presented for payment within a reasonable time after its issue; except that in the case of a bill of exchange, such pre-

sentment will be sufficient if made within a reasonable time after the last negotiation thereof. (See, *post,* Appendix A, Negotiable Instruments Law, §131.) An instrument negotiated or accepted after it is overdue is treated as payable on demand. (See, *post,* Appendix A, Negotiable Instruments Law, §26; and *ante,* §29.)

In these cases, as in others, in determining what is a reasonable or an unreasonable time, regard is to be had to the nature of the instrument, usage of trade or business, if any, and the facts of the particular case. (See, *post,* Appendix A, Negotiable Instruments Law, §4. See, also, Appendix B, Cases No. 24 and 33.) In other words the intention of the parties to be gathered from the circumstances must govern. Thus, in one case, presentment for payment of a demand note six months after its date was held not to be unreasonable as to indorsers familiar with the conversation between the parties when the instrument was delivered. The rules for determining the time for presentment of a demand instrument are very similar to those for determining whether such an instrument is overdue (see, *ante,* §74), except that presentment is for the benefit of indorsers, while the rules in regard to overdue instruments are largely for the benefit of the parties primarily liable. Good business requires action by the holder in sufficient time to avoid all question whether there has been unreasonable delay on his part, or else to procure from parties secondarily liable consent to delay. If an instrument is payable "on demand" bringing a suit thereon is a sufficient demand without any prior action by the holder, provided suit is brought within a reasonable time; but if the party liable pays the proper amount into court without delay, the expense of the suit must be borne by the holder.

Presentment for acceptance, where acceptance is required, and presentment for payment must be made although

the holder knows that acceptance or payment will be refused. Indorsers and the drawer have a right to require that the party expected to accept, or to pay, be given an opportunity to act, so that there may not be any question as to his default. Presentment for payment the day before maturity is not sufficient, as a party cannot be required to pay his debt before it is due. Presentment must be made again the next day even though the party liable has stated positively that he will not pay it, as he might have changed his mind overnight. Presentment the day after maturity is too late, although the instrument would not have been paid if presented the day before. Presentment for payment on the exact day of maturity is one of the conditions annexed to the contract of each indorser and of the drawer, and such condition must be performed to put the indorser or the drawer in default. If there is any doubt in the mind of the holder what the exact day of maturity is, it is good business for him to make presentment on each day that he thinks may be the proper one.

A bill of exchange cannot be presented for acceptance on Sunday or other holiday [see, *post,* Appendix A, Negotiable Instruments Law, §132(2)]; and when the day of maturity of any instrument falls upon such days the instrument is payable on the next succeeding business day. (See, *post,* Appendix A, Negotiable Instruments Law, §145.) Saturday, being a half holiday, is treated as a holiday, except that the holder of a bill of exchange may present it for acceptance before noon on Saturday (see, *post,* Appendix A, Negotiable Instruments Law, §243); and the holder of any instrument payable on demand has the option of making presentment for payment on Saturday before noon.

Presentment must be made during a reasonable hour [see, *post,* Appendix A, Negotiable Instruments Law, §§132(2), 242]; and what constitutes usual and reasonable

hours depends on usage in the place in that locality where presentment is made. Presentment at a place of business should be during the usual hours kept by persons engaged in that trade or business in that locality. If an attempt to make presentment is made during such hours it is legally sufficient, and it is immaterial that the particular person sought keeps shorter hours than others engaged in the same trade or business, so that his place was closed at the time presentment was attempted. It is good business for the holder to make presentment early enough to avoid any question as to the hour; and where the party sought is not found, it sometimes is advisable to make further attempt to see him at a later hour. It is unwise to keep just within the limits of the law.

Presentment at a bank must be made during banking-hours; but if the person to make payment does not have any funds there to meet it at any time during the day, presentment at any time before the bank is closed on that day is sufficient. (See, *post,* Appendix A, Negotiable Instruments Law, §135.)

Presentment at a residence should be during the customary hours of rising and retiring, sometimes called "waking hours." This, as in the case of business hours, does not mean the hours observed by the particular party sought, but the hours observed by persons generally in that community. (See Appendix B, Case No. 25.)

The hour of presentment becomes important chiefly when the party sought is not found. If the holder has gone to the place of presentment during customary hours he has done his duty although he has not been successful and the party sought could have been found if the holder had arrived a little earlier or later; but if the holder does not go during the customary hours and the party sought is not there, pre-

sentment has not been made in such manner as to hold parties secondarily liable, although the party sought was not there at all that day, as he might have made some arrangement to have the instrument accepted or paid while he was absent. Presentment for acceptance at an improper hour may be sufficient if the person sought be actually found, especially if he does not assign as his reason for a refusal that the hour is inconvenient. [See, *post,* Appendix A, Negotiable Instruments Law, §245(3).]

A party liable for payment has the whole of the day of maturity in which to make payment, and technically is not in default until midnight of the day has arrived without payment. The holder, however, has done all that is required of him in regard to presentment if he demands payment at the earliest reasonable hour on the day of maturity. If the party liable is not ready to make payment when presentment is made, but is ready at a later hour, it is his duty to seek the holder and to tender payment in order to avoid default.

Where a holder, having the option to present a bill of exchange for acceptance before it is due, does so and it is not accepted by the drawee, the holder must treat this as dishonor of the instrument and act accordingly. (See, *post,* Appendix A, Negotiable Instruments Law, §247.) He has the right to treat this action by the drawee as final and need not make another presentment for payment (see, *post,* Appendix A, Negotiable Instruments Law, §§248, 260); though he may wait, if he wish, until the day of maturity and then present the bill for payment, in the hope that the drawee meantime may have changed his mind, as refusal by the drawee to accept may have resulted from lack of funds belonging to the drawer at that time, but, after such refusal, he may have come into the possession of sufficient funds with which to pay the bill.

The rules just given in regard to presentment do not have any application to the party primarily liable on a negotiable instrument (see, *post,* Appendix A, Negotiable Instruments Law, §130), such as the maker of a promissory note or the accepter of a bill of exchange. The party primarily liable knows the terms of his contract; and, being the one to make payment, cannot be injured by any delay in presentment, nor can he throw the burden on anyone to remind him that he has not performed his obligations. The holder of an unindorsed promissory note or of an accepted and unindorsed bill of exchange does not lose any of his legal rights against the maker or the acceptor by delay, unless the statute of limitations has run; and the rule is the same if the instrument is indorsed and the holder does not care to hold any of the indorsers or the drawer, intending to rely solely on the party primarily liable. This, however, may not be good business, as the party primarily liable might ultimately prove not to be as financially responsible as was supposed, while an indorser or a drawer, supposed to be worthless, might later acquire some property. The liability of an indorser or a drawer, once fixed by presentment and notice, remains until discharged. (See, *ante,* "Contracts," §76.) The drawer of an accepted bill of exchange would be discharged by non-presentment, although the acceptor would not be.

If a negotiable instrument is made payable at a special place and time and it is not presented by the holder at such place and time, while it does not release the party liable as long as the statute of limitations has not run, yet, if he had funds at such place at the time designated and was ready and willing to pay, his ability and willingness will be equivalent to a tender of payment (see, *post,* Appendix A, Negotiable Instruments Law, §130), with the effect that any tender would have. (See, *ante,* "Contracts," §80.)

PRESENTMENT—TO WHOM MADE.

88. Presentment for acceptance of a bill of exchange should be made to the drawee named therein.

Presentment for payment of a bill of exchange should be made to the acceptor, if the bill previously has been accepted; if the bill has not been previously accepted, presentment for payment should be made to the drawee named therein.

Presentment for payment of a promissory note should be made to the party primarily liable.

If the party primarily liable on a negotiable instrument is absent from the place where presentment for payment is made or is inaccessible, presentment may be made to any person found at such place.

Presentment to an agent of the drawee, acceptor or maker is sufficient if the agent has authority to act in such matters.

If a bill of exchange be addressed to two or more drawees, or if two or more are primarily liable for the payment of a negotiable instrument, presentment must be made to all, unless one of them is authorized to act for the others. If an instrument specify a place for payment, presentment at such place is sufficient although all are not present.

Where the drawees or the parties primarily liable are partners, presentment may be made to anyone, even though there has been a dissolution of the firm.

If the person primarily liable on a negotiable instrument be dead, presentment for payment must be made to his personal representative, if any and he can be found with the exercise of reasonable diligence.

If the drawee of a bill of exchange be dead, presentment for acceptance may be made to his personal representative.

If the drawee of a bill of exchange is an adjudged bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to his trustee or his assignee.

Presentment of a bill of exchange for acceptance should be made to the drawee named therein. (See, *post,* Appendix A, Negotiable Instruments Law, §242.) Presentment for payment of a bill of exchange should be made to the drawee, or to the acceptor if the same has been accepted; and presentment for payment of a promissory note should be made to the party primarily liable—the maker. If the party primarily liable is absent from the place where presentment is properly made, or, if present, access cannot be had to him, presentment may be made to anyone who is found there. [See, *post,* Appendix A, Negotiable Instruments Law, §132(4).]

If the drawee, acceptor or maker has an agent authorized to act in such matters, presentment made to the agent is sufficient. (See, *post,* Appendix A, Negotiable Instruments Law, §242.) Corporations must act through agents entirely, so that presentment to a corporation cannot be made in any other way than to an agent thereof; but it is quite important that presentment should be made to the proper corporate officer. As each partner has implied authority to act for all the others within the scope of the business, if there are two or more drawees, acceptors, or makers and they are partners and a place of presentment is not specified in the instrument, presentment can be made to any one of them. (See, *ante,* "Partnership," §28.) Even after a dissolution of the partnership presentment for payment is properly made to any one of the former partners. (See, *post,* Appendix A, Negotiable Instruments Law, §137.) If joint drawees, acceptors or makers are not partners, presentment must be made to each one individually, unless one has

authority to act for all. [See, *post,* Appendix A, Negotiable Instruments Law, §§138, 242(1).] If a negotiable instrument specify a place of payment, presentment at such place for payment will be sufficient although all of the parties primarily liable are not present.

If the party primarily liable is dead and a place of payment is not specified in the instrument, presentment for payment must be made to his personal representative (executor or administrator) if such there be and if, with the exercise of reasonable diligence, he can be found. (See, *post,* Appendix A, Negotiable Instruments Law, §136.) If none has been appointed, it is at least good business to present it at the late residence of the party sought, making demand on any person of years of discretion, who seems to be in charge. If the drawee of a bill of exchange is dead, presentment is properly made to his personal representative. [See, *post,* Appendix A, Negotiable Instruments Law, §242(2).]

If the drawee has been adjudged a bankrupt or insolvent, or has made an assignment for the benefit of his creditors, presentment may be made to his trustee or assignee. [See, *post,* Appendix A, Negotiable Instruments Law, §242(3).]

PRESENTMENT—HOW MADE.

89. When presentment of a negotiable instrument is made for payment, it must be exhibited to the party from whom payment is demanded.

The person making presentment for payment should exhibit the instrument (see, *post,* Appendix A, Negotiable Instruments Law, §134) in order that the party on whom demand is made may satisfy himself as to its genuineness and of the right of the person so making presentment to receive payment; and also in order that the party may obtain possession of the instrument if he pays it.

Presentment is not sufficient if conditions are annexed which are not expressly or impliedly contained in the instrument, such as that it must be paid in a certain kind of money if any legal tender would be a compliance with the terms of the instrument.

As acceptance of an existing bill of exchange must be made in writing thereon (see, *ante,* §38), it is evident that presentment for acceptance must be made by an exhibition of the bill to the drawee.

NOTICE—TO WHOM GIVEN.

90. Upon dishonor of a negotiable instrument by non-acceptance or by non-payment after proper presentment has been made, prompt notice of such dishonor must be given to such of the parties secondarily liable (indorsers and drawer) as it is desired to hold liable for indemnity.

Notice of dishonor may be given to an authorized agent of an indorser, or of the drawer.

If an indorser or the drawer is dead and his death is known to the party giving notice of dishonor, it must be given to the personal representative of the decedent, if there be one and if, with reasonable diligence, he can be found.

If indorsers or drawers are partners, notice of dishonor given to any one of them is sufficient, even though there has been a dissolution of the firm.

If indorsers or drawers, jointly liable, are not partners, notice of dishonor must be given to each, unless one of them has authority to receive such notice for the others.

Where an indorser or the drawer is bankrupt or an insolvent, or he has made an assignment for the benefit of creditors, notice of dishonor may be given either to the party himself or to his trustee or assignee.

Presentment of a negotiable instrument having been made by the proper party, at the proper place and time, to the proper party and in the proper manner, and it having been dishonored either by non-acceptance or by non-payment, the second implied condition of the contract made by an indorser and by a drawer is that prompt notice of such dishonor must be given to the indorser and to the drawer in order to hold him liable. (See, *ante,* §82.) Notice to an agent is sufficient, if he has authority to receive such notice. (See, *post*, Appendix A, Negotiable Instruments Law, §168; also, *ante*, "Agency," §61.)

The holder of a promissory note or of an accepted bill of exchange is not required to make presentment or to give notice to anyone if he chooses to rely solely on the party primarily liable; or, if there are several indorsers and a drawer, he is not obliged to give notice to each, but may send notice to one alone or to any number of them fewer than all, the only effect being that anyone not given notice is discharged from liability. (See, *post,* Appendix A, Negotiable Instruments Law, §160.) It is not good business, however, to omit notice to anyone secondarily liable.

If an indorser or the drawer is known, by the party giving notice, to be dead, notice must be given to the personal representative, if one and he, with reasonable diligence, can be found; otherwise, notice to the late residence or to the last place of business of the decedent is sufficient. (See, *post,* Appendix A, Negotiable Instruments Law, §169.) In the latter case it is well to give the notice to one who has been named as executor, or who intends to qualify as administrator, if any such person is there.

Where indorsers or drawers are jointly liable and they are partners, notice of dishonor is sufficient if given to any one of them, even after a dissolution of the firm (see, *post,* Appendix A, Negotiable Instruments Law, §170); but if

joint indorsers or joint drawers are not partners, such notice must be given to each of them unless one has authority to receive notice for the others. (See, *post,* Appendix A, Negotiable Instruments Law, §171.)

If an indorser or the drawer has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee. (See, *post,* Appendix A, Negotiable Instruments Law, §172.)

It is evident that notice of dishonor need not be given to the party to whom presentment is made—the maker of a promissory note and the drawee or acceptor of a bill of exchange.

NOTICE—BY WHOM GIVEN.

91. Notice of the dishonor of a negotiable instrument may be given by or on behalf of the holder, or by or on behalf of any party who might be compelled to pay the holder, and who, on such payment, would, in turn, have a right to indemnity from the party to whom notice is given.

Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether such party be his principal or not.

If the holder, having given proper notice, should transfer the instrument, all prior parties liable to the holder would be liable to holders after such transfer.

Notice of the dishonor of a negotiable instrument not given by a party entitled to give such notice, is of no legal effect. Notice must be given either by the party who is the holder at maturity or else by a party who may be compelled to pay the holder.

The party who is first concerned in giving notice is the holder at the time of the dishonor of the instrument, as his failure to give proper notice immediately discharges all general indorsers and the drawer, leaving no one liable except the maker, acceptor, and indorsers, if any, who have waived notice. As was said in the last section, the holder is not obliged to give notice to all indorsers. If he notifies fewer than all, each one so notified becomes at once entitled to give notice in turn to parties prior to himself (see, *post,* Appendix A, Negotiable Instruments Law, §161), but, until an indorser has been given notice, he does not have any right to give notice; and, if he should discharge the instrument, he could not recover indemnity from anyone, any more than a person could who never had been a party to the instrument, although it would be possible for him to acquire the holder's rights by an indorsement or by an assignment from him just as any person could.

As soon as proper notice has been given to an indorser or to the drawer, his liability is said to be "fixed"; and an indorser or drawer, whose liability has become fixed, is liable not only to the party who has properly given him notice but also to the holder although the holder has not given him notice, and to each indorser subsequent to himself whose liability has also been fixed by proper notice and who pays the instrument, although such subsequent indorser may not have given notice to anyone. (See, *post,* Appendix A, Negotiable Instruments Law, §164.) If the holder at maturity gives proper notice to all indorsers and to the drawer, further notice is not required by anyone; but each party, upon paying the instrument, has an immediate right of action against each party prior to himself. (See, *post,* Appendix A, Negotiable Instruments Law, §163.) It is good business, however, for each indorser, as soon as he receives notice, to notify, in turn, each party prior to himself and not to rely

on notice given by another; and, on the other hand, the holder should not assume that any indorser notified by him will give notice to any other party.

A party to whom notice has been properly mailed can give notice even though he has not yet received it, as it is the mailing of the notice, and not its receipt, that fixes liability. (See, *post*, §93.)

These various points can be better understood by an illustration. Suppose a bill of exchange, payable thirty days after its date, is drawn by *A* payable to *B*, and it has been accepted by *X*, the drawee. As soon as the bill is accepted, *X* becomes the party primarily liable, and *A*'s liability is secondary, being in the nature of a first indorser. (See, *ante*, §37.) The instrument then passes from *B*, the payee, through several hands to *E*, who is the holder at maturity, and it bears the successive indorsements of *B*, *C* and *D*. *E* presents the bill to *X* for payment when due, but it is not paid. *E* then has the option of giving notice of non-payment to *A*, *B*, *C*, and *D*. If he does not give them prompt notice, they are discharged (see, *ante*, §82), though this would not affect the liability of *X*, the acceptor, to *E*, who is liable until the statute of limitations has run against the bill, and *X* would have been liable to *E* even without presentment. *E* can give notice to *A*, the drawer, and to all the indorsers, and it is good business for him to do so; but he may select any number fewer than all, and ignore the other or others. Suppose *E* gives proper notice to *A* and to *C*, but not to *B* or to *D*. The liability of *A* and *C* becomes fixed by such notice. *C* would be liable to *E*, and *A* would be liable, not only to *E*, but also to *C* if *C* should pay *E*, even though C was not aware, when he paid *E*, that *A* had been given notice. *D*, however, is discharged by lack of notice; and if he, knowing of the dishonor of the instrument, should give prompt notice to *B*, it would not have the least legal

effect, because *D*, until his liability has been fixed by notice, is not entitled to give notice. Even if *D* should pay the instrument he would not acquire any rights thereon unless he should take it by subsequent indorsement or assignment from *E*. *C*, however, upon notice from *E*, can in turn give notice to *B*, and *B*'s liability then becomes fixed, in which case *B* becomes liable not only to *C* who gave him notice but also to *E* although *E* has not sent *B* any notice; but *C* is not entitled to give notice to *D*, as *D* is not liable to *C*, each indorser being liable to each subsequent party, but not to any party prior to himself. If *E* had notified all parties, each would be liable to subsequent parties without further notice from anyone; though it might be better for each to give notice to parties prior to himself as soon as notice is received. If *E* had notified *D* only, and *D* had then notified *C* and *A*, and *C* had notified *B*, then if each notice was properly made, each indorser and the drawer would be liable to subsequent parties exactly as if *E* had notified them all in the first place. During all this time *X*, the acceptor, remains the party primarily liable, and can be sued at any time before the statute of limitations has run, by *E* or by anyone secondarily liable who has been required to pay the bill.

Where a party has a right to give notice, such notice can be given by his agent, such as a bank having a negotiable instrument for collection; and, when notice is given by an agent, it may be given in his own name or in the name of any party entitled to give notice, even though such latter party was not his principal. (See, *post*, Appendix A, Negotiable Instruments Law, §162.)

If a negotiable instrument be transferred after it is overdue and there are no valid defenses to it, subsequent holders can compel payment not only from the party primarily liable but from each party secondarily liable whose liability has been properly fixed by notice prior to the transfer; that is,

the holder at maturity can make a subsequent transfer of such rights as he possesses at the time of the transfer. (See, *post,* Appendix A, Negotiable Instruments Law, §163.) The implied conditions of the indorsers before maturity and the drawer having been performed, their contracts with the holder and with subsequent parties are absolute; but as an overdue instrument becomes, in effect, one payable on demand (see, *ante,* §29), an indorser after maturity enters into a contract with subsequent holders subject to the implied conditions of presentment and notice of dishonor, as in the case of any demand instrument. (See, *ante,* §87.)

NOTICE—HOW GIVEN.

92. Notice of the dishonor of a negotiable instrument may be oral or written, or partly oral and partly written; and, if written, it need not be signed.

Notice need not be formal. Any terms identifying, although misdescribing, the instrument and indicating that it has been dishonored, will be sufficient.

Written notice may be delivered personally or through the mails.

Notice to a party secondarily liable on a negotiable instrument is bringing knowledge to him of its dishonor in such a way as to indicate that he is expected to pay it. Mere knowledge of dishonor is not equivalent to the notice required by law. To constitute notice, such knowledge, as was said in the last section, must be imparted by or on behalf of someone who can enforce the liability of the party notified.

Notice may be oral or written (see, *post,* Appendix A, Negotiable Instruments Law, §167); and, if written, it need not be signed (see, *post,* Appendix A, Negotiable Instruments Law, §166) if it comes from a party entitled to give it. Insufficient written notice may be supplemented

and validated by oral communication. In case of a dispute, written notice affords better evidence, first, that notice was given, and, second, what the notice contained; yet oral notice possesses the advantage that the party notified is not in as good position to claim that the notice was not definite enough, as he has opportunity to ask questions if he is in doubt.

Notice may be very informal, the only two requisites being that the instrument must be identified, and the notice must indicate that it has been dishonored by non-acceptance or by non-payment. It is much better to add that the party notified is looked to for payment, though this is not essential, it being sufficiently intimated by the fact of giving notice.

A statement that an instrument has been "protested" has been held to be sufficient, as that indicates dishonor (see, *post,* §95); but a statement that the instrument is "due and unpaid" has been held to be insufficient, as it does not necessarily indicate that presentment was made, as is requisite for dishonor.

The best description of an instrument is to accompany the notice, whether oral or written, with a true copy of the instrument and of the indorsements thereon, marking it "copy," in which case there cannot be any mistake as to what instrument is meant; but if a copy be not delivered, the notice should state the date of the instrument, its amount, the parties, when due, by whom indorsed, and where the instrument awaits payment. Notice in the following form would be sufficient:

[Date of notice.]

Take notice that a bill of exchange [or promissory note] of which the following is a copy: [here insert copy], and bearing indorsements as follows: [here make a copy of whatever is written on the back], has been dishonored by non-payment [or non-acceptance], and the holder looks to you for the payment thereof.

[Signature and address of party giving notice.]

To Mr. [Names of Indorsers and Drawer].

The party giving a written notice should make and retain a copy thereof, noting thereon the date it is given.

Even a misdescription of the instrument will not prevent the notice from being sufficient, unless the party notified is actually misled. (See, *post,* Appendix A, Negotiable Instruments Law, §166.) Circumstances would largely govern in event of a misdescription. If the party notified had indorsed but one instrument which he knows is in the possession of the party giving notice, there is not much need of a strictly accurate description, and a very brief and inaccurate description could not mislead him; but if the party notified was an indorser of a great many instruments, some of which were almost identical, a slight misdescription might mislead him to his injury, in which case the notice would not be sufficient. The fact that the party notified is liable on two or more instruments almost identical, and the description might fit either, so that he is in doubt, does not prevent the notice from being sufficient if the leading details of the instrument are correctly given.

Written notice may be delivered personally or sent through the mail (see, *post,* Appendix A, Negotiable Instruments Law, §167); but if the party to be notified is accessible, personal delivery of a written notice, accompanied by an oral statement of its contents, will prevent any doubt and dispute as to the sufficiency of such notice.

NOTICE—WHEN GIVEN.

93. Notice may be given as soon as the instrument is dishonored.

Where the party giving notice of the dishonor of a negotiable instrument and the party to whom notice is given reside in the same place, notice must be given not later than the next business day after dishonor. If notice be given at a place of business, it

must be given before the close of business hours. If given at a residence, it must be given before the usual hours of rest. If notice be sent by mail, it must be deposited in the postoffice in time to reach the addressee in usual course not later than the business day following dishonor.

Where the party giving notice of the dishonor of a negotiable instrument and the party to whom notice is given reside in different places and the notice is sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor; or if there be no mail at a convenient hour on such day, then by the next mail thereafter. If notice is not given by mail, it must be given within the time that it would have been received in due course of mail if it had been deposited in the postoffice.

If notice of dishonor is properly addressed and deposited in the postoffice in proper time, notice is deemed to have been given notwithstanding any miscarriage in the mails.

A party receiving notice of the dishonor has after its receipt the same time for giving notice to prior parties as the holder of the instrument has after dishonor.

If an agent has made the presentment which resulted in the dishonor, he may give notice either to his principal or to the parties liable on the instrument. In either case he is governed, as to time, by the rules applying to any holder; and if he gives notice to his principal, the latter has the same time, after receiving notice, to give notice as if the agent had been an independent holder.

If a bill of exchange is dishonored by non-acceptance, the holder must at once give notice thereof; but he is not required to give notice of a second dishonor by non-payment unless the bill has been accepted since the first dishonor. A holder in due course is not

prejudiced by failure of a former holder to give notice of a dishonor by non-acceptance.

Notice of the dishonor of a negotiable instrument *may* be given just as soon as the instrument is dishonored (see, *post,* Appendix A, Negotiable Instruments Law, §173); and it must be given promptly in order to hold parties secondarily liable. The time within which notice *must* be given has been quite definitely fixed by law.

The reason for requiring promptness in giving notice is to enable the party addressed to take steps to protect himself. Thus, if the drawer of a bill of exchange has funds in the possession of the drawee and has every reason to suppose that the drawee will accept and pay the bill, the drawer should know at once that the drawee is not performing his engagements so that the drawer can regulate his financial dealings with the drawee accordingly, such as stopping remittances to him or enforcing security; or, if the act of the drawee resulted from a misunderstanding, the drawer can have it cleared so as to prevent further trouble.

An indorser, on notice being given to him, can take prompt action to protect himself against loss and to secure reimbursement from those liable to him in turn; and, by making payment to the holder, can stop the running of interest. The law cannot make distinctions in particular cases, but presumes injury if notice is not properly given.

If the party to be notified is a resident of the same place as the party giving notice, and the notice is given personally, it must be given before the close of business hours on the day following dishonor; or, if the notice be given at a residence, before the hours of rest on the following business day. (See, *ante,* §87; see, also, Appendix B, Case No. 26.) If the party giving notice elects to send it by mail, it must be deposited in the postoffice sufficiently early so that, in the usual course of mail, it would reach the addressee within the time allowed for personal notice. (See, *post,* Appendix A, Negotiable Instruments Law, §174.)

If the party giving notice of the dishonor of a negotiable instrument and the party to whom notice is given are residents of different places, notice is sufficient if deposited in the postoffice in time to go by any mail departing on the next business day after dishonor. If there should be but one mail leaving on the following day and that departs at an inconveniently early hour, notice will be mailed in proper time if it leaves by the next mail thereafter. The party giving notice is not required to use the mail; but if he uses other means, notice must be given in time to be received by the party notified, as soon as it would have been received if sent by mail under the rules just stated. (See, *post,* Appendix A, Negotiable Instruments Law, §175.)

While Sundays and holidays are not counted in the computation of time for notice (see, *post,* Appendix A, Negotiable Instruments Law, §5), notice may be given on those days, unless in violation of some statute.

Whenever notice is given by mail, the party giving it has done all that is required of him if the letter was properly addressed, stamped and mailed in ample time, although it may be delayed in transmission or never reach its destination. (See, *post,* Appendix A, Negotiable Instruments Law, §§176, 183.) If the addressee lives in a place of any size, the street and number should be added to the address unless they cannot be ascertained in time. In event a failure to receive notice causes a dispute whether it had ever been sent, the act of mailing would have to be proved as any other fact.

Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter-box under the control of the Post Office Department. (See, *post,* Appendix A, Negotiable Instruments Law, §177.)

As was said, *ante,* in §91, as soon as an indorser's liability is fixed by having been given proper notice of dishonor, he,

in turn, can give notice to parties liable to him, and must do so if they have not previously been given proper notice by someone and such indorser wishes to hold them. As an indorser cannot give notice before his liability is fixed, it follows that, if there are many indorsers, several days might elapse after dishonor before the first indorser would be aware of it. All the law requires in such a case is that each indorser in turn acts promptly. He is allowed the same time after receiving notice, in which to give notice to antecedent parties, as the holder had after dishonor under the rules above given. (See, *post,* Appendix A, Negotiable Instruments Law, §178.)

If an instrument has been dishonored in the hands of an agent, he may give notice either to his principal or direct to prior parties. If he gives notice to his principal, the agent is regarded as an independent holder so far as the time allowed him is concerned; and his principal has the same time after receipt of notice from the agent, in which to give notice to prior parties, as an indorser would have after receiving notice. (See, *post,* Appendix A, Negotiable Instruments Law, §165.)

Referring to the illustration used *ante,* in §91, suppose all of the parties reside in different places. *E,* the holder, sends the bill to a bank for collection, which presents it to *X,* the acceptor, for payment at maturity, but it is not paid. The bank, being the agent of *E,* can either notify him of the dishonor, or it can notify prior parties. If it notifies *E,* a notice mailed on the day following dishonor would be in sufficient time. This notice is received by *E* the second day after dishonor. It is better for *E* to give notice to all of the prior parties; but suppose he notifies *D* alone, mailing the notice the third day after dishonor, and *D,* receiving the notice the fourth day, mails a notice to *C* on the fifth day. *C* receives the notice on the sixth day, and mails a notice to

B on the seventh day, which *B* receives on the eighth day, and, in turn, mails a notice to *A*, the drawer, on the ninth day, which is received on the tenth day. Although *A* is not informed until the tenth business day after dishonor, yet he has been notified in time to fix his liability. *E*, however, would not be allowed to argue that, inasmuch as *A* might not receive notice until the tenth day after dishonor, he himself might wait until the tenth day and telegraph *A*; nor could *E* wait until the second business day after dishonor, and then mail notice to *B* and *C*, arguing that the notices would be received sooner than under the above method. *E* must mail his notice not later than the next business day after dishonor or after he has received notice thereof, or all prior parties, unless his agent has given proper notice, will be discharged. If notice has been given day by day as above, the liability of each party is fixed as soon as notice is mailed to him, so that when *A* finally is notified, *E* can hold any one of the parties, although *E* himself notified *D* alone; and any one of the parties can hold any party prior to himself. The law insists on promptness in giving notice when it is given but does not require anything unreasonable.

Whenever a bill of exchange is presented for acceptance and acceptance, for any reason, is not given, the holder must at once treat the instrument as dishonored and give prompt notice thereof to the drawer, and to indorsers, if any, or they will be discharged. The holder is not required to present the bill later for payment, though he may do so if he wish; and upon non-payment he is not required to give notice of this second dishonor unless the bill in the meantime has been accepted. (See, *post*, Appendix A, Negotiable Instruments Law, §187.) If, after dishonor of a bill of exchange by non-acceptance, the holder does not give proper notice thereof, a subsequent holder in due course is not prejudiced

by such omission (see, *post,* Appendix A, Negotiable Instruments Law, §188); though he should give notice of any dishonor occurring while the bill is in his possession.

NOTICE—WHERE GIVEN.

94. Notice of the dishonor of a negotiable instrument if given in proper time to an indorser or to the drawer in person is sufficient wherever it is given.

Notice of dishonor sent to any place is sufficient if actually received by the addressee in proper time.

If a party to be notified has added an address to his signature on the instrument, notice of the dishonor thereof is sufficient if sent to that address.

If the party to be notified has not added an address to his signature on the instrument, notice of the dishonor thereof may be sent to his place of business or to his residence.

If the party to be notified of the dishonor of a negotiable instrument is not a resident of the place where the notice is mailed, such notice may be sent either to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters; or if he live in one place and have his place of business in another, notice may be sent to either place. If he is sojourning in another place, notice may be sent to such place.

If a party is known to be dead and a personal representative has not been appointed, notice of dishonor may be sent to his last residence or to his last place of business.

If notice of the dishonor of a negotiable instrument is given personally to an indorser or the drawer in proper time, it is not very material where it is given; nor is it material where notice is sent if it actually reaches the party in proper time (see, *post,* Appendix A, Negotiable Instruments Law,

§179), as the object of notice—to give prompt information of dishonor, has been accomplished. Where the party addressed does not receive the notice promptly or does not receive it at all, then the question becomes important whether the party giving notice has performed his full duty in sending notice to the proper place. (See Appendix B, Case No. 27.)

If a party to whom notice of dishonor is to be sent has added an address to his signature on the instrument, notice must be sent there, and is not sufficient if sent to another address unless it is duly received. (See, *post,* Appendix A, Negotiable Instruments Law, §179.)

If the party to be notified has not added an address to his signature on the instrument, notice of its dishonor may be given at his place of business or at his residence. There is a presumption that an indorsement was made at the place where the instrument is dated (see, *post,* Appendix A, Negotiable Instruments Law, §76), hence, that the indorser may be found there; but this presumption is very slight. If an indorser or drawer have two places of business equally prominent, notice may be given at either. If the indorser or drawer sought cannot be found at the proper place, notice should be left with the person in charge or with some person of discretion. (See, Appendix B, Case No. 29.) If no one is there, the notice may be placed upon a desk or table in a prominent place; or, if the door be locked, it may be shoved under the door or placed in the key-hole where it should be noticed. If the indorser or drawer reside at a hotel or in a boarding-house and, after inquiry, he is not found there, notice may be left in his room or with anyone of discretion who is in charge.

If the party giving notice of the dishonor of a negotiable instrument is in doubt as to which of two or more places to deliver it, it is wise for him to send notice to every place

where there is a reasonable probability of its reaching the party to be notified. Good business requires the party sending the notice not to take any chances, either as to place, time or manner of giving notice, especially if the amount involved is large.

If the party to be notified of dishonor is a non-resident, notice should be mailed to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive letters. [See, *post,* Appendix A, Negotiable Instruments Law, §179(1).] If he reside in one place and have his place of business in another, notice may be mailed to either place. [See, *post,* Appendix A, Negotiable Instruments Law, §179(2).] If he is sojourning in another place, notice may be sent there [see, *post,* Appendix A, Negotiable Instruments Law, §179(3)]; as would be the case of notice sent to a member of congress during a session of congress at Washington.

The sender of the notice usually knows the location of the last indorser, as he dealt directly with him in acquiring the instrument; but the holder may not know anything about other indorsers or have time to make inquiry. In such a case, if the holder sends his notices by mail, it is customary for him to prepare notices for all of the parties so far as he is able to do so, and to enclose them with his notice to the indorser whose address he knows, with a request to him to forward them to their proper destinations. This the indorser addressed should be willing to do, as it is to his own advantage to do so.

If an indorser or the drawer is known to be dead and a personal representative has not been appointed, notice of dishonor may be sent to his last place of residence or to his last place of business. (See, *post,* Appendix A, Negotiable Instruments Law, §169.)

PROTEST.

95. Protest, in its narrow and proper sense, is a formal statement, usually made by a Notary Public under his hand and seal, that an instrument has been dishonored after proper presentment.

Protest must be made if a bill of exchange appears on its face to be a foreign one; if such a bill is not protested, the drawer and indorsers thereof are discharged.

If a negotiable instrument other than a foreign bill of exchange has been dishonored protest is optional with the holder.

As has been said heretofore, the liability of a drawer and of indorsers is fixed as soon as proper presentment has been made and notice of dishonor has been properly given; and such parties if they do not indemnify the holder promptly are subject to suit. If the instrument is a foreign bill of exchange, it is evident that the acts constituting dishonor occurred in another State than the one in which the drawer resides, and they may have occurred in another country. A suit is usually required to be brought in a court where the party to be sued is found; and, in any kind of a suit, it is incumbent upon the party bringing it to prove the facts upon which he bases his case. As the drawer and indorsers of a negotiable instrument are not liable unless the implied conditions of presentment and notice have been properly performed, the party bringing suit for indemnity must prove that proper presentment has been made and notices have been properly sent. In most cases it would be impracticable for the person who had actually made the presentment and sent the notices, to go to another jurisdiction in order to testify thereto; hence resort is had to a verified statement. If this, however, is done, the party called upon to make payment might say with good reason that any-

body can make an affidavit, and that many persons would not hesitate to make a false one if something was to be gained therefrom and the facts stated therein to be true could not conveniently be disproved. Hence it is reasonable to require that the statement in regard to presentment and dishonor should be made under official authority. There are very few States whose officers have the same appellations, and incumbents of offices bearing similar designations might not be performing the same duties; and the difference would be still greater where foreign countries are concerned. Hence the official, upon whose statement as to presentment and dishonor reliance is asked to be placed in a court in another jurisdiction, should be one whose title is known to all civilized countries; and such an official is the one known as a Notary Public, and probably the only one who is so known. Hence custom originally, and now the law, requires the formal statement in regard to presentment and dishonor of a foreign bill of exchange to be made under the hand and seal of a Notary Public (see, *post,* Appendix A, Negotiable Instruments Law, §§261, 262); and this formal statement is called Protest.

"Protest" in the popular signification of the word has a broader meaning, including all acts performed to fix the liability of a drawer or an indorser.

Protest is required if the instrument is a foreign bill of exchange which appears on its face to be such; otherwise the drawer and the indorsers are discharged, as protest in such a case is an implied condition annexed to their contract of indemnity. Protest of other instruments is unnecessary (see, *post,* Appendix A, Negotiable Instruments Law, §260), though it may be made of any negotiable instrument, either for non-acceptance or for non-payment (see, *post,* Appendix A, Negotiable Instruments Law, §189); and it

may be good business in many cases to protest an instrument where protest is not required, especially if any of the parties are non-residents.

It is not necessary for the holder of a foreign bill of exchange to secure a Notary to make presentment in the first place, as it does not follow that it will be dishonored. If, however, the bill is dishonored, then, a Notary Public makes another presentment the same day in order that he may be able to certify of his own knowledge as to the facts stated in the protest. While the Notary is not required to send the notices of dishonor, he usually does so, and it is much better that he should, certifying to that fact in the protest.

Anyone having many negotiable instruments for collection, such as a bank, usually employs one or more Notaries whose business it is to make presentment of all negotiable instruments, so as to be in a position to make protest without delay if occasion demands.

A Notary, in making presentment and sending notices, is governed by the same rules as to time and manner as apply to the holder. A bill must be protested at the place of dishonor. (See, *post,* Appendix A, Negotiable Instruments Law, §264.)

A bill which has been protested for non-acceptance may be subsequently protested for non-payment. (See, *post,* Appendix A, Negotiable Instruments Law, §265.)

A memorandum of the essential facts constituting dishonor must be made on the day they occur, either on the instrument itself or in a note-book, which is called "noting." The actual drawing of the formal certificate may occur subsequently, though it must be dated as of the day of dishonor. (See, *post,* Appendix A, Negotiable Instruments Law, §263.)

Sometimes printed forms of bills of exchange have the words "no protest" at the end where they can be easily detached by the collector before presentment, thus giving the collector the necessary instructions without informing the drawee that protest will not be made even though the instru-

ment is dishonored. A drawee sometimes will accept or pay a bill if he thinks it will be protested if he refuses to honor it, but will not accept or pay it if he knows nothing will result from a dishonor.

If a bill has been lost or is wrongfully detained from the holder, protest may be made on a copy or written particulars thereof. (See, *post,* Appendix A, Negotiable Instruments Law, §268.)

It might happen that the holder of a bill of exchange is unable to obtain the services of a Notary in time to make presentment and protest, and the law provides for such a contingency by allowing protest to be made by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. (See, *post,* Appendix A, Negotiable Instruments Law, §262.)

EXCUSES.

96. Presentment for acceptance, presentment for payment, notice of dishonor, and protest may be dispensed with entirely under certain circumstances, or only as to certain parties; or it may be that delay only is excused. If one act alone is excused, other acts, to which the excuse does not apply, must be performed.

Presentment is entirely excused if—

After the exercise of reasonable diligence it cannot be made.

The drawee is a fictitious person.

Presentment of a bill of exchange to the drawee for acceptance is excused if he—

Is dead.

Has absconded.

Does not have capacity to accept.

Presentment of a negotiable instrument is excused if presentment is waived.

Presentment of a negotiable instrument for payment is not required, so far as the drawer is concerned, if

he does not have any right to expect or to require that the drawee or acceptor will pay it.

Presentment of a negotiable instrument for payment is not required in order to charge an indorser, if the instrument was made or was accepted for his accommodation, and he does not have any reason to expect the instrument will be paid.

Notice of the dishonor of a negotiable instrument is dispensed with when, after the exercise of reasonable diligence, it cannot be given.

Notice of dishonor need not be given to the drawer of a bill of exchange if the—

Drawer and drawee are the same person.

Drawer does not have any right to expect or to require that the drawee or acceptor will honor the instrument; as where the—

Drawer did not have any right to draw.

Drawee is a fictitious person.

Drawer has countermanded payment.

Drawee does not have capacity to contract.

Notice of dishonor of a negotiable instrument need not be given to an indorser if he—

Knew, at the time of his indorsement, that the drawee was a fictitious person.

Knew, at the time of his indorsement, that the drawee did not have capacity to contract.

Is the person to whom presentment for payment was made.

Is an accommodated party.

Protest is dispensed with by any circumstances which would dispense with notice of dishonor.

Delay in the presentment of a negotiable instrument, in giving notice of its dishonor, and in protesting are excused when caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence.

Whenever any act is not excused entirely but delay only is excused, such act must be performed with reasonable diligence after the cause of the delay ceases.

As presentment, notice of dishonor, and protest are largely for the benefit of indorsers and the drawer, there is a limit to the burden which can be thrown on the holder in requiring performance of these implied conditions. The law does not require impossibilities nor expect anything unreasonable or absolutely useless to be done. In some cases presentment, notice and protest are all dispensed with; in other cases one or two only of these acts may not be required. In some cases, one or more of these acts may be excused so far as certain parties are concerned; and sometimes it is delay only that is excused. Because one act is excused, it does not follow that other acts are likewise excused; or if a certain act is not requisite to hold one party, its performance may be very essential in order to hold another party.

The first implied condition which the holder of a negotiable instrument is called upon to perform is presentment (see *ante,* §82), which, in some cases, is for acceptance, but is for payment in most cases. Presentment for any purpose is excused if, after the exercise of reasonable diligence, it cannot be made [see, *post,* Appendix A, Negotiable Instruments Law, §§142(1), 245 (2)], as would be the case if the party sought cannot be found (see Appendix B, Case No. 29); or if the party sought is the drawee of a bill of exchange and he is a fictitious person. [See, *post,* Appendix A, Negotiable Instruments Law, §§142(2), 245(1).] Although presentment may be excused in these cases and the holder may treat the instrument as dishonored, he is not excused from giving notice to prior parties who have acted in good faith.

Presentment of a bill of exchange for acceptance is excused if the drawee is dead or has absconded; or if he does not have capacity to enter into the contract resulting from acceptance. Thus, the holder is not required to take the acceptance of an infant, whose contract would be voidable (see *ante,* "Contracts," §13); and the holder, without presentment, may treat the bill as dishonored by non-acceptance. [See, *post,* Appendix A, Negotiable Instruments Law, §245(1).]

Where presentment of a bill of exchange for acceptance has been irregular, further presentment is excused if acceptance has been refused on some other ground than the manner of presentment. [See, *post,* Appendix A, Negotiable Instruments Law, §245(3).] Thus, if presentment for acceptance should be made at an improper hour, it is sufficient if the person upon whom demand is made does not place his refusal to honor the instrument on the ground that presentment was made at an unreasonable hour.

Presentment of a negotiable instrument for payment is not required if presentment has been waived. [See, *post,* Appendix A, Negotiable Instruments Law, §142(3).] The subject of "waiver" will be further discussed in the following section.

Where the drawer of a bill of exchange does not have any reasonable expectation that it will be paid, he cannot possibly suffer any injury from non-presentment; hence he is liable although presentment is not made. (See, *post,* Appendix A, Negotiable Instruments Law, §139.) This would be the case where the drawee does not owe or has not received any funds from the drawer at any time and there has not been any agreement by the drawee to pay the bill. Indorsers, however, of such a bill, who have acted in good faith, would be entitled to have presentment made and notice given as in any case. If the drawee has promised to accept

a bill of exchange as an accommodation to the drawer, the latter then is entitled to have presentment made and notice of dishonor given to him; and the same is true in every case where he might reasonably expect the bill to be honored by the drawee.

If an indorser of a negotiable instrument is an accommodated party and there is no agreement by the party who appears to be primarily liable thereon, to pay it when due, it is the duty of such indorser to make payment, and he is not discharged because someone else may not have been asked to do what he should have done. (See, *post,* Appendix A, Negotiable Instruments Law, §140.) Not having recourse against any other party, he cannot be injured by being required to perform his duty of making payment although formal presentment was omitted. However, the fact that an indorser or the drawer might be known by the holder to be an accommodated party will not alone excuse presentment and notice of dishonor, if there was any reasonable expectation on his part that the instrument would be paid if properly presented.

Presentment of a bill of exchange for payment is not required if it previously has been dishonored by non-acceptance. (See, *post,* Appendix A, Negotiable Instruments Law, §248.)

There is some similarity in the excuses which are sufficient to dispense with notice of the dishonor of a negotiable instrument and those sufficient to dispense with presentment. Notice of dishonor is not required where the party desiring to give it has exercised due diligence in trying to do so, but has not been successful. (See, *post,* Appendix A, Negotiable Instruments Law, §183.) If the location of the party to be notified is not known, every reasonable effort should be made to find him, and inquiry should be made of every other party to the instrument likely to be able to give the information. Although making presentment of a negotiable

instrument or giving notice of its dishonor is excused because the party sought cannot, after the exercise of reasonable diligence, be found, yet if the address of such party is discovered later, presentment or notice, as the case may be, is required within a reasonable time after such discovery.

While a bill of exchange usually names three parties, two of these parties may be one and the same person, as is the case if the drawer should draw on himself, or if a partner draws on the firm in a partnership matter. If, in these cases, the bill is presented to the drawee and dishonored, the law does not require the useless ceremony of giving notice to the same party in his other capacity as drawer—to give him information which he already possesses, that he has not performed his contract.

As presentment of a bill of exchange is not required, so far as the drawer is concerned, if he does not have any right to expect or to require that the drawee or acceptor will honor the instrument, as where he draws on a stranger, likewise notice of dishonor is not required. If the drawer should draw on a fictitious person, the drawer knows that the bill cannot be presented and that it will not be accepted or paid by the drawee; hence he cannot throw on the holder the burden of notifying him of what he knew from the beginning. Likewise if the drawer has instructed the drawee not to make payment, the drawer is not entitled to notice from the holder that the drawee has obeyed instructions. (See, *post,* Appendix A, Negotiable Instruments Law, §185.)

As the holder of the bill of exchange cannot be required to take an acceptance which is void or voidable, he is not compelled to make presentment to one lacking capacity to contract; and notice to the drawer of the dishonor of the bill in such a case is likewise excused, the drawer being presumed to know the party on whom he draws.

Many of the rules excusing notice to the drawer apply to

an indorser also, except that where the drawer is conclusively presumed to know certain facts, notice to an indorser is not excused for similar reasons unless the indorser actually knew the facts. Thus, if an indorser, at the time of his indorsement, knows that the drawee of a bill of exchange is a fictitious person, or that the drawee lacks capacity to contract, the indorser is not entitled, any more than the drawer, to have notice of a dishonor which, at the time he entered into his contract of indorsement, he knew would follow. [See, *post,* Appendix A, Negotiable Instruments Law, §186(1).]

If the party to whom presentment is made is also an indorser of the instrument, he is not entitled to receive notice of a dishonor of which he was the cause and already knows. [See, *post,* Appendix A, Negotiable Instruments Law, §186(2).] It is not uncommon for a promissory note to be made payable to the order of the maker (see, *ante,* §14), in which case it does not possess any validity until indorsed by him. (See, *post,* Appendix A, Negotiable Instruments Law, §320.) The signature of the maker on the back of the note is not a technical indorsement and he does not acquire the full rights of an indorser, but his liability as maker remains as before.

The rules above given where the drawer was an accommodated party apply with equal force to an indorser who is an accommodated party and is expected to pay the instrument when due—notice of dishonor to him is not required. [See, *post,* Appendix A, Negotiable Instruments Law, §186(3).]

Whatever will excuse notice of the dishonor of a negotiable instrument will likewise excuse protest. (See, *post,* Appendix A, Negotiable Instruments Law, §267.)

Inevitable accident will excuse delay in presentment of a negotiable instrument for payment (see, *post,* Appendix A,

Negotiable Instruments Law, §141), notice of dishonor (see *post,* Negotiable Instruments Law, §184), and protest. (See, *post,* Appendix A, Negotiable Instruments Law, §267.) If the sickness of, serious injury to, or death of the holder or his authorized agent, on the eve of the maturity of a negotiable instrument, or just previous to giving notice of a dishonor thereof, should cause delay in presentment, giving notice, or protest, such delay will be excused and indorsers and the drawer will not be discharged, unless an unreasonable time elapses after the conditions which caused the emergency have ceased to exist. Conditions arising from war or riots, from the prevalence of a contagious disease, from a conflagration completely suspending all business, from an act of Nature such as an earthquake, tornado, or flood, making it practically impossible or highly dangerous to attempt to transact any business, or from confinement of a party, as in a prison where he is inaccessible, will excuse postponement of presentment of a negotiable instrument and of giving notice of its dishonor. The mere fact that conditions existing at the time presentment should be made or notice should be given make these acts a hardship or more burdensome than they would be under ordinary conditions, will not excuse even delay. Due diligence is required, although that is all that is required. Good business demands that an effort be made by the party interested to surmount all obstacles to prompt and proper action.

If a negotiable instrument has been mailed in ample time in order that it may be presented at the proper place, and it is lost or delayed without any fault of the holder so that such presentment cannot be made at the proper time, the delay will be excused. (See Appendix B, Case No. 28.)

Conditions excusing delay do not excuse presentment and notice entirely but merely postpone them until the impediment to prompt action is removed, when the holder must

act within a reasonable time; and the holder must act as far as he reasonably can in spite of impediments to the performance of all of the implied conditions. The fact that presentment is impossible does not excuse notice or protest if these acts are possible (see Appendix B, Case No. 29); nor is presentment excused when practicable, merely because notice of dishonor cannot be given promptly. Inability to make presentment after due diligence is to be treated as a dishonor of the instrument so far as indorsers and the drawer are concerned. [See, *post,* Appendix A, Negotiable Instruments Law, §143(1).]

Thus, if the drawee of a bill of exchange bearing an indorsement should be suffering from smallpox and be in a detention-hospital which no one is allowed to approach and communication cannot be had with him, and the drawer should be shut up in a city besieged by the enemy, the holder is excused from making presentment to the drawee and from giving notice to the drawer, but notice of non-acceptance or of non-payment to the indorser is not excused if there is nothing to prevent such notice; and presentment must be made to the drawee just as soon as he recovers, and notice must be given to the drawer as soon as he can be reached.

If the day of maturity arrives between the date of the death and the date of the appointment of a personal representative of the party who should have made presentment of a negotiable instrument, presentment by the personal representative will be in sufficient time if made without unnecessary delay after he has received his appointment as such from court.

Delay in presentment of a bill of exchange for payment is excused if caused by the place of acceptance being at another place than that of payment and the time is insufficient for the holder, exercising reasonable diligence after properly presenting it for acceptance, to present it for payment on the day it falls due (see, *post,* Appendix A, Negotiable Instruments Law, §244); as where a bill is payable three days after sight at some place other than the drawee's place of business or residence and there is considerable distance between such place of payment and the place where the drawee is located.

WAIVER.

97. **The conditions of presentment, notice, and protest may be waived by any party for whose benefit they are implied; and an indorser or drawer who has waived a condition is liable for indemnity without the performance of such condition.**

Waiver may occur—

Before dishonor.

After dishonor.

Waiver may be—

Express.

Implied.

Waiver of one condition is not a waiver of another unless the latter is impliedly included in the former.

A waiver embodied in a negotiable instrument is binding upon all parties; but if written in connection with the signature of one indorser, it binds him only.

The general rule is that anyone who is to be benefited by the performance of a condition may waive it; and as the implied conditions of presentment, notice of dishonor, and protest are for the benefit of the drawer and indorsers, any or all of such conditions may be waived by them, and such a waiver may occur either before or after dishonor, and may be expressed or implied. (See, *post,* Appendix A, Negotiable Instruments Law, §180.) Any party who has waived a condition is liable for indemnity without the performance of that condition.

A waiver of one act will not extend to any other acts than the one mentioned, unless impliedly included therein. Thus, if notice is waived, presentment must be made or an indorser or the drawer will be discharged; or if presentment is waived, notice is not excused, as the party waiving presentment may have supposed that payment would be made without presentment, but desires notice if payment is not

made. If protest is waived, both presentment and notice will be excused, as these two acts are included in making protest. (See, *post,* Appendix A, Negotiable Instruments Law, §182.) The popular rather than the legal meaning of protest is presumed to have been intended in such a case. (See, *ante,* §95.)

An express waiver may appear on the instrument itself, on a separate paper, or even be given orally. If any words appear on the front of a negotiable instrument, indicating that any condition is waived, such waiver enters into the contract of every party, original and subsequent, unless expressly negatived; but if the waiver appears in connection with the signature of one indorser only, it does not enter into the contract of any other party. (See, *post,* Appendix A, Negotiable Instruments Law, §181.) Thus, "no protest" stamped across the front of a bill of exchange before its delivery would form a part of the contract, not only of the drawer but also of every indorser, to indemnify the holder without presentment and notice of dishonor; but if an indorsement on a bill of exchange should read: "Pay Frank O. Lowden. Presentment and notice waived. [Signed:] Charles A. Thatcher," this particular indorser would be liable to the holder without presentment and notice of dishonor, but to hold the drawer and the other indorsers, if any, presentment would have to be made and notice of dishonor given as in any case.

A waiver of presentment will be implied before dishonor if an indorser or drawer makes any unequivocal statement to the holder calculated to induce him not to make presentment, such as speaking of the uselessness of making presentment, or a request by an indorser or drawer that an extension of the time of payment be given to the party primarily liable; but such implied waiver will not enter into the contract of any party except the one speaking, unless the speaker

is authorized to act in behalf of the others. (See Appendix B, Cases No. 22 and 30.)

Waiver after maturity is implied if an indorser or a drawer who would have a legal right to consider himself discharged by lack of presentment, of notice, or of protest, promises to make payment, after having knowledge of the facts; and a waiver likewise would be implied from a part payment by him. If, however, such a promise or part payment is made on the erroneous supposition that proper presentment had been made, it would not constitute a waiver, but if the promise or part payment be made with knowledge of lack of presentment, it would constitute a waiver although the party made his promise in ignorance of his legal rights, as, everyone being conclusively presumed to know the law, he knows that he is not liable unless he chooses to be. A consideration is not required for such a promise, as the promise is not a new one, but in theory is merely a waiver of an existing defense. (See, *ante,* "Contracts," §32.)

WARRANTIES.

98. Formal presentment and notice of dishonor are not necessary in all cases to hold an indorser on his implied warranties; but the holder must not be negligent in giving a notice of a breach thereof.

It will be recalled that the implied contract arising from a general and ordinary indorsement accomplishes three things—transfers the title, indemnifies future holders, and warrants the instrument. (See, *ante,* §54.) The conditions of presentment and notice apply to that part of the contract relating to indemnity; and they do not necessarily apply to the warranties. All that is required in such cases is that there be no unreasonable delay by the holder in informing

the indorser of the facts, so that the latter, in turn, can take action against his own transferror.

Thus, if the instrument transferred is a forgery, the warranty of genuineness is broken as soon as the instrument is delivered by the indorser; hence the holder can bring an action as soon as he discovers the forgery. He is not required to wait until the instrument is apparently due and then go through the form of making a presentment. He might be negligent and lose his right of action if he waited until maturity before informing the indorser, and much time had elapsed. On the other hand, the discovery of the breach might not occur until after the day of maturity is past. Thus an infant, having paid his promissory note at maturity to the holder, might afterwards disaffirm his contract and recover the money so paid, in which case an indorser of the note would be liable upon his implied warranty to the holder that all prior parties had capacity to contract.

CHAPTER VII.

DISCHARGE.

99. Of Instrument—Definition.
100. Of Instrument—Manner.
101. Of Instrument—Payment—Release.
102. Of Parties Secondarily Liable.
103. Unintentional or Unauthorized Cancellation.

OF INSTRUMENT—DEFINITION.

99. Discharge of a negotiable instrument means the extinguishment of all rights of action thereon.

Discharge of a negotiable instrument means the extinguishment of all rights of action thereon. It must be borne in mind that there is a distinction between the discharge of an instrument as a contract capable of giving rights, and the discharge of the parties to such an instrument. Certain parties may be discharged without discharging the instrument; but when the instrument itself is discharged it ceases to be negotiable and also to be a contract at all, and, as there is no longer any contract, all parties are necessarily discharged along with the instrument.

OF INSTRUMENT—MANNER.

100. At or after maturity a negotiable instrument is discharged by any transaction between the holder and the party primarily liable thereon which would discharge any simple contract for the payment of money.

Before maturity it may be discharged by any act of the holder which would discharge it after maturity, provided the face of the instrument indicates such discharge; otherwise it is valid in the hands of a holder in due course.

An ordinary contract between two parties calling for the payment of money may be discharged by various methods and at any time if both parties assent (see, *ante,* "Contracts," §76); and if a negotiable instrument, between the time of its issue and the time it is due, never left the possession of the original payee, the same rules would apply to it. However, a negotiable instrument is intended to pass from hand to hand, and, under the rules peculiar to negotiability, the act of one holder does not necessarily prejudice the rights of a subsequent one; hence, what would be sufficient to discharge an ordinary contract will not always discharge a negotiable instrument.

As an overdue negotiable instrument gives constructive notice, to every subsequent holder, of all defenses which can be made to it (see, *ante,* §74), it follows that its discharge in any manner at or after maturity is complete as to everyone; but, generally, an attempt to discharge a negotiable instrument before maturity in a manner which might be sufficient for an ordinary contract, while a good defense against the holder and against anyone with notice, would not have any effect on a holder in due course. (See, *ante,* §81.) So far as a holder in due course is concerned, he, upon acquiring the instrument, has accepted the implied offer originally made to subsequent parties (see, *ante,* §§68, 79), which is not withdrawn as to him by any act of the party primarily liable which is not communicated to him, and he has entered into a new contract of which the instrument forms a part and which is not discharged by any prior transaction. So far as he is concerned the instrument remains a valid contract.

(See, *post,* Appendix A, Negotiable Instruments Law, §314.)

If the discharge of a negotiable instrument, not overdue, is indicated in some way on its face, it is then completely discharged, every subsequent holder having constructive notice thereof. (See, *ante,* §73.)

OF INSTRUMENT—PAYMENT—RELEASE.

101. A negotiable instrument is discharged by—

- Payment in due course by or on behalf of the party primarily liable.
- Payment in due course by an accommodated party.
- Party primarily liable becoming the holder in his own right at or after maturity.
- Release; which may be by—
  - Intentional cancellation by anyone having the right to make it.
  - Renunciation; which may be by—
    - An unconditional writing by the holder at or after maturity.
    - Delivery to the party primarily liable with intention to renounce the holder's rights, either at or after maturity.
  - Material alteration without consent; but a holder in due course may enforce it according to its original tenor.

Whether a negotiable instrument, given when a former instrument is due, is satisfaction of the original instrument, or is merely an extension of time, or is security, will depend upon the intention of the parties. In the absence of an express agreement on the point, there is a prima facie presumption that the new instrument is accepted in satisfaction if the original instrument be surrendered; but if the original instrument be not surrendered,

there is a prima facie presumption that the new instrument was not taken in satisfaction of the old one.

Taking a new instrument in place of a former one which is surrendered is presumed not to be in satisfaction of the original one if the new instrument is a forgery or otherwise a fraud on the creditor.

Every negotiable instrument must call for the payment of a certain sum of money at a fixed and determinable future time (see, *ante,* §21); hence, the natural and most common method of discharging a negotiable instrument is for the party primarily liable or his agent to pay such sum of money at the proper time. [See, *post,* Appendix A, Negotiable Instruments Law, §§90, 200(1).] Payment is made in due course when it is made in full, at or after the maturity of the instrument, to the holder thereof in good faith without notice that his title is defective. (See, *post,* Appendix A, Negotiable Instruments Law, §148.)

To discharge a negotiable instrument by payment it must be of the full amount due; and the holder is not required to surrender the instrument until he has received every cent of principal and interest and also any other charges properly incurred, such as an attorney-fee for collection if such a provision appears in the instrument, and protest-fees. A negotiable instrument not providing for the payment of interest does not draw interest until after maturity; but if it provides for the payment of interest without specifying when interest is to begin, the interest runs from the date of the instrument, or, if the instrument is undated, from its issue. [See, *post,* Appendix A, Negotiable Instruments Law, §36(2).] An instrument payable on demand may call for interest; but if it does not do so, interest will not begin until a demand has been made. If a rate of interest be specified in an instrument, such rate will govern unless usurious or

there is a provision for compound interest. (See, *ante,* "Contracts," §49.) If the instrument calls for interest without specifying the rate, it draws interest from its date at the rate established by statute for such cases, known as the "legal rate." (See, *ante,* §25.) This varies in different States and ranges from five to eight per cent., usually being lower in the older and more densely populated States than it is in the newer or more sparsely populated ones. If an instrument is not paid at maturity, interest will run until it is paid unless the party liable has made a tender or done what is regarded as an equivalent thereto, which must be kept good. (See, *ante,* "Contracts," §80.) The rate remains the same after maturity as before unless there is a provision in the instrument, which is not uncommon, for a higher rate after maturity, inserted as an incentive to prompt payment at maturity. Part payment of the principal stops the running of interest, on the amount so paid, from the date of the payment. If a judgment upon a negotiable instrument is obtained in court against a party who does not have any sufficient defense, such judgment is for the unpaid principal, all unpaid interest to the date of the judgment, other charges if any, and the costs of the suit; and thereafter the entire amount draws interest at the rate provided in the statute for judgments, whether higher or lower than the rate on the instrument itself.

The doctrine of the application or appropriation of payments applies to payments made by a party liable upon a negotiable instrument. (See, *ante,* "Contracts," §79.) If the party making payment is liable to the holder on other debts also, whether negotiable instruments or not, such party, when making a payment insufficient to pay all the claims against him, has the privilege of designating to which indebtedness such payment is to be applied and the holder must so apply it (see, *ante,* "Contracts," Case No. 51); but if the party making payment does not expressly or impliedly designate how it is to be

applied, the holder has the privilege of applying it to any debt then due. Even if the money paid by a party primarily liable has been furnished to him by a party secondarily liable, for the purpose of making full payment of the instrument upon which the party is secondarily liable so as to discharge the latter, yet if the party primarily liable, when making payment, does not designate that the money is to be applied to the instrument on which the party so furnishing the money is liable, and the holder of the note is ignorant of the fact that the money has been furnished by a party secondarily liable, the holder can apply the payment on another note of the party primarily liable, and still hold the party who is secondarily liable on the other note. (See, *ante,* "Contracts," Case No. 52.)

Payment to the rightful holder of a negotiable instrument at or after maturity, by the party primarily liable, completely discharges a negotiable instrument although not cancelled and it is left in the possession of the holder, as the fact that it is overdue gives constructive notice, to every subsequent holder, of all defenses which may be made to it. (See, *ante,* §74.) Payment before maturity is not a complete discharge of a negotiable instrument, as a second payment thereof can be compelled if it reaches the hands of a holder in due course (see, *ante,* §81); hence, when full payment is made before maturity, it is important to have "paid" marked across the front of the instrument, and to have any partial payment of principal before it is due or a prepayment of interest noted on the back so as to give constructive notice to all subsequent holders. Even tearing an instrument in two may not be sufficient to discharge it completely. However, if sufficiently cancelled, the fraudulent erasure of the cancellation-marks would constitute such a forgery as to prevent the instrument from being enforced even by an innocent person.

If the party primarily liable on a negotiable instrument pays it after maturity with the money of another, it becomes a question of intention whether the party primarily liable is

merely a debtor of the person advancing the money so that the instrument is discharged, or whether the party primarily liable is merely the agent for the person advancing the money, in which case such payment would be merely a purchase of the instrument for the person advancing the money. The point involved is whether indorsers would be discharged. If the instrument is regarded as paid they are discharged, but if the transaction is a transfer merely, the indorsers may remain liable to the person who advanced the money. Another point involved is that the statute of limitations usually runs longer on a written instrument than on an oral promise, which would become important if the person advancing the money seeks reimbursement by suit from the party who was liable on the instrument, and the period provided by the statute for bringing suits on oral or on implied contracts had run, but the period allowed for bringing suits on written contracts had not expired. (See, *ante,* "Contracts," §103.) Besides, written evidence is better than oral (see, *ante,* "Contracts," §33); so that, if suit is brought on the instrument, the evidence would be the instrument itself (see, *ante,* §77) which would be simpler and more satisfactory than if proof was required of an oral or of a *quasi*-contract.

It is evident that a payment made at any time will not have any effect if not made to the holder of the instrument to be paid, or to his authorized agent. (See, *ante*, §81. See, also, Appendix B, Case No. 21.) Hence, a party about to make a payment should be careful to ascertain whether the instrument is in the possession of the person to be paid. If a negotiable instrument is in effect payable to bearer (see, *ante,* §§31, 49), the party making payment will be protected if he, acting in good faith, pays the holder although not the owner; but if an instrument payable to a designated person and not indorsed by him should be presented for payment by some other person, payment to such holder would not discharge the liability of the party making payment unless the person paid was acting as agent of the holder or in some other capacity entitling him to receive payment, such as an

assignee or other holder of the equitable title having a right to the proceeds.

The holder of a negotiable instrument is not obliged to accept payment from a stranger, that is, from one not liable on the instrument in some way or the agent of such party. If the holder does accept payment from a stranger and the instrument is delivered to the latter without indorsement, there is a *prima facie* presumption of payment unless the instrument is one which can be transferred by delivery only, in which case there is a *prima facie* presumption that payment discharging the instrument was not intended.

The point becomes important where there are indorsers on the instrument. Thus, the maker of a promissory note bearing indorsements is insolvent. Proper presentment is made at maturity and prompt notice is given to the indorsers. The maker's wife, having property in her own right, pays the holder of the note. It then becomes a question of intention whether the wife practically made a gift to her husband and discharged the instrument and the liability of all indorsers, or whether she merely wished to save trouble to the holder, whom she knew, and intended to acquire the instrument as owner. In the latter case she could hold the indorsers in whose financial welfare she may not be interested, leaving them to their theoretical but practically useless remedy against her husband's trustee in bankruptcy.

Where an instrument is made payable at a bank, it is equivalent to an order to pay the same for the account of the principal debtor thereon. (See, *post,* Appendix A, Negotiable Instruments Law, §147.)

When a bill of exchange is paid by the drawee or acceptor it becomes a voucher in his hands, and, if he owes the drawer or has any funds of the latter, he can charge the amount of the bill against the drawer; or, if he is not indebted to the drawer in any way, he can bring suit against the drawer for the amount so paid for his accommodation.

If a bill of exchange be drawn in a set (see, *ante,* §13) and two or more of the parts are in the hands of different holders, the drawee will be protected if he accepts or pays the part first presented to him (see, *post,* Appendix A, Negotiable Instruments Law, §311); and a discharge after maturity of any one is a discharge of the whole bill. (See, *post,* Appendix A, Negotiable Instruments Law, §315.)

If the maker of a promissory note or the acceptor of a bill of exchange is an accommodation party (see, *ante,* §16), and the accommodated party has agreed to pay the instrument at maturity, such payment by the accommodated party discharges all parties and the instrument as well. [See, *post,* Appendix A, Negotiable Instruments Law, §200(2).] Thus if *A,* needing money, should draw a bill of exchange on *B* payable in thirty days which *B* accepts for the accommodation of *A, B* not owing *A* or possessing any of his funds and *A* agreeing to pay the bill when due, payment by *A* at maturity would discharge the instrument and *B* as well, although *B* appears on the instrument as the party primarily liable for payment.

While a negotiable instrument calls for the payment of money alone, payment might be made in tangible property, or in intangible property such as another instrument or the application of a counterclaim, provided both parties agree thereto.

Where a negotiable instrument is due and unpaid and a new one is given by the debtor to the holder, the latter instrument may be taken either as full satisfaction of the former, or merely as an extension, or as security, leaving the original instrument still in force. (See, *ante,* "Contracts," §101.) The intention of the parties will govern. If there is an express agreement upon this point, the intention will be clear; but if, as is frequently the case, the parties have not had any understanding in regard to the matter, the courts must determine their intention from the facts.

If the old instrument was surrendered upon delivery of the new one, there is a very strong presumption that it was to be treated as paid, even though the terms of the new one are not the same as those of the former. If, however, the new instrument is a forgery, surrender of the old one would not discharge it, as the transaction would be based on either fraud or mistake, and, hence, voidable or void.

Retention of the original instrument raises a presumption that the new one was not taken in satisfaction; but this presumption is not conclusive, as failure to return the old instrument may have resulted from temporary inconvenience or from inadvertence. If the terms of the new instrument differ from those of the old one as to the amount, or the signatures to the new instrument are not the same as those on the original one, all of these facts and the reasons therefor must be considered in determining whether or not the original instrument was discharged by the new one, even though the original instrument may not have been surrendered by the creditor.

Where a valid negotiable instrument, due at a later date, is taken without any intention of discharging a former one, it at least suspends the right of action on the original instrument until it appears that the new instrument has not been paid as expected.

It will be observed that good business requires a creditor, taking a new negotiable instrument, to stipulate that it is not taken in satisfaction, if such be his intention.

If the new agreement in regard to substitution is made before maturity and there is nothing on the face of the old instrument to indicate its discharge, the party primarily liable may be compelled to pay each one if in the possession of a holder in due course.

A negotiable instrument, by successive transfers before maturity, sometimes comes into the hands of a former party,

who may be the party primarily liable. If the latter cancels the instrument, or retains it until maturity, it is discharged without any further action [see, *post,* Appendix A, Negotiable Instruments Law, §200 (5)]; but he has the privilege of again placing it in circulation before maturity.

A release, at or after maturity, of a party primarily liable on a negotiable instrument will discharge it. Such a release may result from the act of the holder with an intention to release, or it may be by operation of law. An intentional release by the holder may be effected in three ways—first, an intentional cancellation of the instrument [see, *post,* Appendix A, Negotiable Instruments Law, §200(3)] with or without delivery; second, a written and absolute release delivered by the party primarily liable (see, *post,* Appendix A, Negotiable Instruments Law, §203) with or without the instrument; third, delivery of the instrument to the party primarily liable with intention by the holder to renounce all of his rights therein, without cancellation or any writing. A release may cover all or a portion of the amount due on the instrument, and is one of the exceptions to the rule that an agreement to accept part of a debt in full settlement is void for want of consideration. (See, *ante,* "Contracts," §31.) Possession irregularly obtained by a party liable on the instrument would not affect the holder's rights any further than causing him trouble by proving such wrongful possession. An attempted release of a negotiable instrument before maturity, either by a separate writing or by the delivery thereof, cannot affect a holder in due course (see, *ante,* §81); but its cancellation would give constructive notice to every subsequent holder. (See, *ante,* §73.)

A negotiable instrument may be discharged by operation of law in several ways, one of which is by a material alteration without the consent of all parties affected (see Appendix B, Case No. 2; and, *ante,* "Contracts," Case No. 57);

though such an alteration may not affect the rights of a holder in due course. (See, *post,* Appendix A, Negotiable Instruments Law, §205.) This subject, having received attion, *ante,* in §80, will not be considered any further here.

OF PARTIES SECONDARILY LIABLE.

102. All parties secondarily liable on a negotiable instrument are discharged by anything which discharges the instrument.

Parties secondarily liable on a negotiable instrument are liable to one another in the order of the time of signature, unless two or more intended to be jointly liable.

A party secondarily liable on a negotiable instrument may be discharged without the instrument being discharged. A discharge of a party secondarily liable on a negotiable instrument may result from—

Payment by him to the holder after maturity; or before maturity, as against such holder or anyone not a holder in due course.

His release by the holder; which may be by—

The intentional act of the holder for that purpose.

Operation of Law resulting from some act of the holder not performed to accomplish that particular purpose.

Payment of a negotiable instrument by a party secondarily liable for such payment, or his acquiring the instrument in due course, entitles him to enforce it against parties prior to himself; or, generally, he can negotiate it.

As has been explained heretofore, if a negotiable instrument passes through several hands, a number of new implied contracts spring up with each transfer (see, *ante,* §56), but as all of such subsequent contracts are based on the original instrument, it follows that when a negotiable instrument is

discharged, not only are all of the original parties discharged but also all subsequent parties, that is, parties secondarily liable as well as parties primarily liable [see, *post,* Appendix A, Negotiable Instruments Law, §201(1)]; but one or more of the parties secondarily liable may be discharged without discharging the instrument or necessarily affecting the liability of other parties.

Indorsers of a negotiable instrument are generally liable to one another in chronological order (see, *ante,* §46), which usually, though not necessarily, is the order in which they appear on the back of the instrument. (See, *post,* Appendix A, Negotiable Instruments Law, §118.) If one indorser should improperly sign his name above the signature of a prior indorser, the rights of the individual indorsers are not affected, though it might cause the indorser signing in the wrong place some trouble in proving the facts. (See, *ante,* §52.) Indorsements should be made in order of time. The drawer of a bill of exchange is liable to all regular indorsers; and, after acceptance, his liability is similar to that of the first indorser of a promissory note, the acceptor becoming liable to the drawer. (See, *ante,* §§37, 82.)

If two or more holders of a negotiable instrument have a common interest therein, their indorsement would bind them jointly and severally to future holders (see, *post,* Appendix A, Negotiable Instruments Law, §118), but they are not individually liable to one another except so far as the right of contribution is concerned if one alone should be called upon to pay more than his share. (See, *ante,* "Contracts," §10.) Thus, if *A, B* and *C* should sell some goods which they owned in common, and the buyer should transfer to them a negotiable instrument by a blank indorsement for the price thereof which they in turn indorse, their signatures would follow one another so that they would appear to have been successive holders of the instrument. If they are not named as joint payees or as joint indorsers so that there is nothing on the instrument indicating their joint liability, it is good business for them to

indicate in some way, as by including their names in a brace, that they together are making but one transfer.

Each indorser as well as the drawer enters into an implied conditional contract to indemnify each future holder (see, *ante,* §54); and if the holder at maturity makes proper presentment and gives prompt notice of dishonor to such indorser and the drawer, he has complied with the implied conditions (see, *ante,* §82), and the liability of indorsers and the drawer is absolute until discharged in some way. This implied contract to indemnify may be discharged before maturity in the same manner as any executory contract may be discharged, and after maturity the resulting right of action may be discharged in the same manner as any right of action. (See, *ante,* "Contracts," §100.) The more common methods of discharge are by payment and by release. Payment, in the broad sense here used, consists of giving anything of value which is received in satisfaction of the indebtedness evidenced by the instrument. If payment be made to the holder at or after maturity, the liability of the particular party making payment is completely discharged as to all parties subsequent to himself; but if payment by an indorser is received by the holder before maturity, such indorser would be liable to a holder in due course (see, *ante,* §81), payment by an indorser being governed by rules similar to those governing payment by a party primarily liable discussed in the preceding section. Before making payment, a party secondarily liable should ascertain not only whether the instrument is in the possession of the person paid, but also whether proper presentment was made; otherwise he may not be legally liable for payment. It is also good business for him to take a receipt for any payment made by him as well as taking possession of the instrument, as an undisputed receipt would be sufficient evidence of payment where mere possession of the instrument might not be, as

where the party making payment occupies the same premises as the holder, especially after the death of the latter and the party paying had access to the papers of the party paid.

If any party not primarily liable should pay the holder the whole or a part of the amount due, leaving the holder in possession of the instrument, there is nothing wrong in the holder recovering the full amount from the party primarily liable, the holder then becoming a trustee for the benefit of the party who previously made payment, to the extent of the amount so paid by him.

As each indorser and the drawer makes a contract to indemnify each holder after himself (see, *ante,* §§19, 61), it follows that, as soon as any indorser has made payment, he in turn is entitled to indemnity from some party prior to himself; and, generally, each party secondarily liable on a negotiable instrument is, after payment by himself, entitled to payment from the party primarily liable. As soon as a party secondarily liable has received full indemnity from one or more of the parties prior to himself, his rights cease.

If a negotiable instrument, in its circulation from hand to hand, should again reach one of the parties secondarily liable thereon, he would then become the holder, possessing the rights of any holder so far as parties prior to himself are concerned; but he would not possess any rights against those who indorsed the instrument after he originally held it. (See, *post,* Appendix A, Negotiable Instruments Law, §80; and, *ante,* §57.)

An indorser, paying or acquiring the instrument at any time, is not obliged either to retain it until maturity or to enforce it after maturity; but he may strike out all indorsements subsequent to his which he cannot enforce, and may negotiate the instrument again. (See, *post,* Appendix A, Negotiable Instruments Law, §202.)

The drawer of a bill of exchange payable to the order of anyone but himself cannot, upon subsequently acquiring the bill, negotiate it, his sole right, in such a case, being against the

acceptor if any; and an indorser who is an accommodated party, upon acquiring the instrument is not entitled to place it in circulation again.

The release of a party secondarily liable on a negotiable instrument is governed by rules similar to those applying to the release of a party primarily liable. (See, *ante,* §101.) A release of a party secondarily liable may result from some act of the holder intended as a release, or it may result from the application of some legal principle, sometimes causing an effect quite contrary to the actual intention and wish of the holder.

Any party secondarily liable on a negotiable instrument may be individually released by the intentional cancellation of his signature by the holder. [See, *post,* Appendix A, Negotiable Instruments Law, §201(2).] Such a release, even before maturity, would release the party from liability to all subsequent holders, as his release would be evident from an inspection of the instrument. (See, *ante,* §73.)

If the holder should strike out an indorsement in full which is necessary to make his title, he thereby would deprive himself of the rights of a holder in due course, and become a mere assignee without indorsement. (See, *ante,* §§60, 65.)

A release of a party secondarily liable on a negotiable instrument may be made, without a cancellation of his signature, by an unconditional writing signed by the holder and delivered to the party to be released; but such a release before maturity would not affect the rights of a holder in due course, nor would an executory oral release by the holder at any time change the liability of a party secondarily liable, as it would merely amount to an agreement without consideration and insufficient as to form. A release is in the nature of a gift, and, if executed by the delivery of the instrument to the party secondarily liable, an oral release would be effective.

A party secondarily liable on a negotiable instrument may be discharged by operation of law in several ways, chief among which would be by a discharge of any party prior to himself, a binding extension of time given to a party prior to himself, relinquishment of any security given by a party prior to himself, and tender of payment by himself or by some prior party.

As soon as any party to a negotiable instrument is completely discharged in any manner by the act of the holder, every party subsequent to the one discharged is also released [see, *post,* Appendix A, Negotiable Instruments Law, §201(3)]; otherwise the release either would not have any effect, or else a party secondarily liable would be deprived inequitably of a right to be indemnified, thus suffering injury.

Thus, if a negotiable instrument has been indorsed in blank by *A, B* and *C* successively, the holder would have a right to release *B* by striking out his name. If, after striking out *B*'s name, the holder should be allowed to recover indemnity from *C,* and *C,* in turn, should be allowed to recover indemnity from *B,* the holder's attempt to release *B* would be ineffectual. On the other hand if the holder should be allowed to recover from *C,* and *C,* in turn, should be denied indemnity from *B* because the latter had been released, a great wrong might be perpetrated on *C,* as *B* and *C* might be the only financially responsible parties on the instrument; hence it would be very unjust to allow the holder, after taking away the remedy of a party, to recover from him. The law, therefore, gives full effect to the intention of the holder to discharge a party, and prevents injustice by denying recovery from any party subsequent to the one so discharged. (See, *post,* Appendix A, Negotiable Instruments Law, §78.)

Discharging one party secondarily liable on a negotiable instrument does not affect the rights of the holder against any party prior to the one discharged, as prior parties do not have any indemnity from subsequent parties. Thus, in the illustration above, the holder's release of B would not affect

the holder's right of indemnity from *A*, as *A* never had any right against either *B* or *C*.

A discharge of the party primarily liable necessarily releases all parties secondarily liable, as their ultimate right of indemnity is thus taken away.

If a party secondarily liable on a negotiable instrument consents to the discharge of a prior party, then the party so consenting is not released, he in effect agreeing to remain liable notwithstanding such discharge.

A release given by the holder to any party to a negotiable instrument will not discharge parties subsequent to the one released if the holder, by an express term in his release, expressly reserved his right of recourse against such subsequent parties. [See, *post,* Appendix A, Negotiable Instruments Law; §201(5).] This form of expression is a contingent release equivalent to the holder agreeing to a release of such prior party provided subsequent parties do not object thereto. This will prevent recovery by the holder from the party released, but will not prevent recovery by any subsequent party from the party released, as any subsequent party seeking to hold the party released, indicates by such act that he does not assent to the release, and the contingency as to such assent not having occurred, the release is inoperative to that extent.

A binding extension of the time of payment given to any party without reservation will instantly discharge all parties subsequent to such party, not consenting to such extension. [See, *post,* Appendix A, Negotiable Instruments Law, §201(6). See, also, Appendix B, Case No. 22.] The reason for this rule is that an indorser liable for payment is entitled to make payment at once and to recover immediately from any prior party. If a party from whom the indorser is entitled to receive indemnity has been given an extension of time, such party cannot be compelled to indemnify the indorser until the expiration of the extended time, and the financial responsibility of such prior party may change for the worse in the interval with the result that, if the indorser making payment could have proceeded at once, he would have been reimbursed,

but at the expiration of the extended period his remedy is practically worthless. It is immaterial that actual injury has not resulted from the extension; the law will not undertake to pass upon that point but presumes in all cases that injury resulted from an extension. To constitute a binding extension of time it must be by an agreement possessing all the elements of a contract—the parties granting it must have capacity, its terms must be definite, there must be a consideration therefor and it must be free from fraud and mistake. (See, *ante,* "Contracts," §9.) If the extension be granted with a reservation of rights against subsequent parties, the latter are not discharged, as the extension is made contingent upon their consent.

If the holder of a negotiable instrument at maturity relinquishes any security for the instrument given by any party thereto, or negligently loses any means for enforcing payment, all parties subsequent to such party, unless consenting to such relinquishment, are discharged to the extent of the value of the security so relinquished. The reason for this rule is that any subsequent party, upon payment of the instrument, would be subrogated to this security, that is, would have a right to enforce it for his own benefit, so that he is actually injured to the extent of the value of the security of which he has been deprived, and it would be inequitable to hold him fully liable after means for enforcing whole or part payment have been voluntarily given up. Such relinquishment before maturity could not affect the rights of a holder in due course.

A party secondarily liable on a negotiable instrument is discharged if either he or any party prior to himself makes a legal tender of the full amount due, which is refused by the holder. The party making the tender is discharged, as he cannot proceed against parties prior to himself until he has made payment, and, if his tender be refused, it is similar to an extension of time—he cannot proceed at once, and the law presumes that he is injured by the delay. He is not obliged to keep his tender good. (See, *ante,* "Contracts," §80.) As the party making the tender is immediately discharged, all parties subsequent to him would be likewise discharged. [See *post,* Appendix A, Negotiable Instruments Law, §201(4).] It would not be just to allow the holder to recover from them

after it was in his power to receive payment discharging the instrument, and he has refused to take advantage of the offer. A party primarily liable it not discharged by a tender.

As a party secondarily liable on a negotiable instrument is a surety in the broad sense of that term, his discharge by operation of law is governed by the principles of suretyship, which will be discussed more fully, *post,* in Volume VI.

If a party to a negotiable instrument is discharged by operation of law by virtue of some statute making his contract unenforceable merely, such as the Bankruptcy Act or the Statute of Limitations, without any action having been taken by the holder, parties subsequent to the party discharged remain liable.

UNINTENTIONAL OR UNAUTHORIZED CANCELLATION.

103. Unintentional or unauthorized cancellation does not have any effect beyond compelling the party alleging that it was not intentional or not authorized, to prove it.

A cancellation of a negotiable instrument or of any part thereof or of a signature thereon, if made unintentionally or under a mistake, or without authority from the holder, is inoperative; but the burden of proving that a cancellation was made unintentionally or under a mistake or without authority rests on the party alleging it. (See, *post,* Appendix A, Negotiable Instruments Law, §204.)

CHAPTER VIII.

CHECKS.

104. Rules Governing.
105. Certification—What Is.
106. Certification—Effect.
107. Presentment—Delay.
108. Rights of Holder against Bank.
109. Rights of Drawer against Bank—Stopping Payment.
110. Rights of Drawer against Bank—Wrongful Refusal to Pay.
111. Right of Bank to Refuse Payment.
112. Notice of Dishonor.

RULES GOVERNING.

104. Most of the general rules governing negotiable instruments apply to checks; but there are some rules peculiar to checks.

Checks are the most common negotiable instruments in circulation; and, therefore, are the most important. Payments of most large amounts and of many small ones are made with checks instead of with money; they have become indispensable in the transaction of business, and commerce would be paralyzed if their use, for some reason, was suddenly stopped. While the general rules governing ordinary bills of exchange apply to checks (see, *post,* Appendix A, Negotiable Instruments Law, §321; see, also, Appendix B, Cases No. 6, 33 and 34), there are a few rules peculiar to checks which it is quite important should be known, and which will be the subject of this chapter. The definition,

elements and form of a check, and the designation of the parties thereto have already been given. (See, *ante,* §§9, 12, 15.)

It is a popular impression that a check is a receipt; but it is so to a limited extent only, that is, when accompanied by other evidence. If *A,* owing *B* $100, should send him a check for that amount, and, later, *B* claimed that he never had been paid, the production by *A* of his paid check bearing *B*'s indorsement does not indicate that this particular debt was paid, but merely shows that *B* was paid such sum of money; it might have been paid for some other purpose, such as for goods purchased at the time of payment. If the drawer had owed the payee two similar sums, the mere production of one check would not indicate that each had been paid. The drawer must produce further evidence to make out a *prima facie* case of payment, such as that he delivered or sent it in payment of this particular debt. If, however, the drawer of a check states thereon the claim which is intended to be paid by it, indorsement by the payee becomes a receipt for that claim, so that when the drawer, producing his check, testifies that the notation was on the check at the time it was delivered to the payee, he has shown a receipt for the payment of the claim. If a check is not intended for the payee personally, it is advisable to indicate that fact thereon in some way. Thus, if a remittance is intended for a society of which *A* is treasurer, the check should be made payable "to the order of *A,* treasurer *X* Society."

Whenever a debtor delivers or sends a check in payment of a disputed claim, accompanied by a statement that such check is sent in full settlement thereof, its retention by the creditor constitutes full payment and he cannot compel the debtor to pay more. (See, *ante,* "Contracts," §80.) If the creditor is not satisfied with the amount he receives he should at once return the check with a statement to that effect. (See, *ante,* Case No. 54.)

CERTIFICATION—WHAT IS.

105. Certification of a check is the written acknowledgment by the bank upon which it is drawn, that it is valid and will be paid upon proper presentment. It is equivalent to acceptance.

The holder of a check is not required to present it for acceptance; and, if presented for that purpose, the bank is not required to accept it and no legal consequences would follow a refusal to do so, the sole duty of the bank being to pay it when properly presented. It is the custom, however, for banks, as a matter of accommodation at least, to certify checks presented for that purpose; and this custom is so common that possibly a duty to certify might be implied as a part of the contract with a depositor. In any event, a bank refusing to certify a check merely for the reason that it was not under any legal obligation to do so, would subject itself to criticism and loss of business. Certification is the equivalent of acceptance (see, *post,* Appendix A, Negotiable Instruments Law, §323), consisting of a written acknowledgment that the check is good and will be paid on demand to any rightful holder. (See Appendix B, Case No. 6.) It usually is made with a rubber-stamp across the face of the check, and bears the signature of some agent of the bank authorized to make certification. The cashier of a bank has implied authority to certify checks, though usually other employees are given actual authority to bind the bank in this way. If certification is made by anyone having apparent or actual authority, the bank is bound to a holder in due course. (See, *ante,* §81.) Certification wrongfully or erroneously made can be recalled if it can be done before the check reaches a holder in due course and the holder is not injured. Certification by one not having any apparent or actual

authority does not bind the bank even to a holder in due course. (See, *ante,* §80.)

Certification will be made at the request of anyone presenting a check for that purpose, whether he is the legal holder or not, as the bank, by certification, does not agree to pay the person presenting it for certification, but to pay it to the rightful owner when properly presented.

CERTIFICATION—EFFECT.

106. Certification makes the check the direct obligation of the bank.

Certification of a check discharges all parties except the party at whose instance certification is procured and those who become parties thereafter.

Certification, in effect, makes a new instrument of a check. The act of certification discharges all parties prior to the holder at the time of certification (see, *post,* Appendix A, Negotiable Instruments Law, §324), and a new agreement is entered into between the bank and such holder which is similar to a negotiable promissory note issued by the bank, as the bank becomes primarily liable for the payment of the amount called for in the check. As soon as a check is certified, the bank charges the amount against the drawer's account, he at once losing all control over the check and the amount it calls for, unless he himself is the holder after certification. It is the same as if the bank had paid the check to the holder and the holder had at once deposited the money in the bank and received a certificate of deposit payable on demand. The drawer cannot draw out the amount covered by a certified check although he becomes apprehensive of a failure of the bank. It is for these reasons that certification instantly releases all parties prior to the one procuring certification. (See Appendix B, Case No. 31.)

It would not be just to hold them after the opportunity to protect themselves has been taken away by the voluntary act of another.

If the drawer himself has the check certified before delivering it to the payee, the drawer remains liable to all subsequent holders, as the check does not become a valid contract with the payee until delivery to the latter, so that the drawer becomes a party to the check after its certification. If the drawer, for some reason, does not deliver a certified check to the payee, the drawer should indorse and deposit it to his own account in order that his account at the bank may stand as it was before certification. A check certified by the drawer gives the payee and subsequent holders not only the benefit of the financial responsibility of the bank but also that of the drawer as in the case of an accepted bill of exchange. In some instances it may be good business for the payee to require certification by the drawer before delivery.

If indorsements are made on a check both before and after its certification, those who became parties before certification are instantly discharged, while those who are parties to the check after certification are liable to the holder. An indorser's implied contract of indemnity applies to the check as it is at the time of indorsement.

If a bank certify a post-dated check before its date, it cannot be charged to the drawer's account if it leaves a balance insufficient to pay checks presented before the day of its date arrives. Authority given to an officer to certify checks is not necessarily authority to certify a post-dated check.

PRESENTMENT—DELAY.

107. If a check is not presented for payment within a reasonable time after its issue, the drawer is discharged from liability so far as he suffers loss as the result of such delay.

An indorser of a check is discharged from all liability unless it is presented for payment within a reasonable time after its delivery by him.

If the party receiving a check and the bank upon which it is drawn are in the same place, the check must be presented for payment not later than the next business day after its receipt, or the delay will generally be treated as unreasonable.

If the party receiving a check and the bank upon which it is drawn are in different places, it must be forwarded for presentment not later than the next business day after its receipt. If sent to an agent for presentment, he must present it for payment not later than the next business day after its receipt by him. If longer time is taken, it generally is regarded as unreasonable delay.

Although a check is payable instantly on demand and is not intended to circulate indefinitely, yet, as it takes the part of money, it is not necessarily wrong for the holder not to present it promptly for payment. A check does not become invalid merely by remaining in circulation, though most checks either do not circulate at all or else do so for a very limited period. The general rule is that a check is not due until payment has been demanded, so that, if originally valid, it remains enforceable without demand as long as the statute of limitations applicable to written instruments has not run. If demand is made within the statutory period and payment is wrongfully refused, the statute of limitations begins to run over again from the time of the demand. On the other hand, the parties to a check, as in the case of any negotiable instrument, have entered into an implied contract of indemnity with each subsequent holder, and it would not be just to prolong this liability unreasonably. A time, therefore, must arrive when this liability will cease. On this point, the law makes a distinction between the drawer and

the indorser of a check. The drawer of a check, unlike the drawer of an ordinary bill of exchange, generally issues the instrument for his convenience alone and to save himself the trouble and risk of keeping cash on hand with which to make payments. Theoretically, at least, it is an accommodation to the drawer if the payee will receive a check instead of demanding cash. The drawer's liability, therefore, should be and it is more extensive than that of the indorsers of a check, who are governed by the general rules applying to ordinary bills of exchange payable on demand. An indorser is absolutely discharged unless the check is presented for payment within a reasonable time after he receives it, whether he sustains any loss or not, as the law presumes injury from delay; the drawer, however, remains liable as long as the check is an enforceable instrument, however long the delay, unless he has sustained actual loss by reason of the delay. (See, *post,* Appendix A, Negotiable Instruments Law, §322.) The only instance in which the drawer can be injured by unreasonable delay in presenting a check for payment, is failure of the bank on which the check is drawn. As an indorser of a check is discharged entirely by unreasonable delay, and the drawer is discharged if he sustains loss by a failure of the bank after the expiration of a reasonable time, it becomes necessary to determine what is a reasonable time for presenting a check for payment. The law has laid down rules for determining this point.

If the bank on which a check is drawn and the payee named therein are in the same place, presentment for payment must be made before the close of banking-hours on the next business day following its delivery. (See Appendix B, Case No. 32.) Any longer delay will discharge the drawer to the extent of any loss caused him by a failure of the bank. If the transferee of a check and the bank on which it is drawn are in the same place, presentment must be made

before the close of banking-hours on the next business day following its delivery or his indorser will be absolutely discharged. Any longer delay will be entirely at the risk of the holder, his sole remedy thereafter being against the drawer; and the drawer may be wholly or partially discharged if the bank fails.

If the holder of a check, being in the place where the bank is located, employs an agent to make presentment for payment, the time is not extended thereby, but the holder's agent must make presentment within the time allowed the holder. The holder's agent in these cases is usually the bank in which he is a depositor.

Suppose *A*, in Chicago, receives from the drawer on Monday a check drawn on the *X* Bank of Chicago. *A* must present it for payment at the *X* Bank not later than Tuesday (if not a holiday), in order to hold the drawer. If *A*, on Tuesday afternoon, deposits the check to his account in the *Y* Bank of Chicago, it would not be presented to the *X* Bank by the *Y* Bank until Wednesday; and if the *X* Bank fails on Tuesday, the drawer is discharged to the extent of any loss he sustains in regard to the check by reason of such failure.

The holder of a check is entitled to all the time allowed by law for presentment although he might have acted more promptly. Suppose a check is received by the payee on Monday morning, and that afternoon he goes to the bank on which it is drawn intending to obtain payment but forgets to do so, although the check would have been paid if presented. On Tuesday afternoon he again goes to the bank, but discovers that the bank failed at noon on that day. The drawer is not discharged at all, as the holder has presented it within the time allowed him by law and there has not been any unreasonable delay on his part. Conversely, if the payee of a check has it certified, the drawer is instantly discharged although he would have remained liable if the check had not been certified. Thus, in the above illustration, if the payee had presented the check for certification on Monday forenoon, the drawer would have been at once discharged although the drawer would have remained liable on the check, if not certified, until the close

of banking-hours on Tuesday, notwithstanding a prior failure of the bank.

It must be borne in mind that if a check is post-dated, these rules cannot apply until the day of its date arrives. If the check is ante-dated, it is the day of actual delivery which governs and not the date appearing on the check. (See, *ante,* §36; and, *post,* Appendix A, Negotiable Instruments Law, §31.)

While the liability of the drawer of a check continues longer than that of an indorser if the bank does not fail, it might be otherwise in event of a bank failure. Thus *A,* the payee of a check, holds it four business days and then indorses it to *B*. *B* presents it for payment the day after he receives it, but finds the bank has failed. The drawer has been discharged by the unreasonable delay of *A,* but *B* can hold *A,* as *B* has presented the check within a reasonable time after its delivery to him by *A*.

If the holder of a check and the bank upon which it is drawn are in different places, additional time is allowed to the holder in which to forward the check for payment (see Appendix B, Case No. 33); but he must not delay unreasonably in forwarding it or indorsers will be discharged absolutely and the drawer will be discharged to the extent of any loss sustained by reason of a failure of the bank. The holder is deemed to have acted within a reasonable time if he forwards the check not later than the next business day after he receives it. In these cases, if the check is forwarded to an agent to make presentment for payment, the delay is not unreasonable if presentment is made by the agent before the close of banking-hours on the day following the receipt of the check by him. The agent, in these cases, is usually a bank located in the same place as the one on which the check is drawn. As it is not regarded as good business to forward a check directly to the bank on which it is drawn (although this frequently is done), the law allows the necessary time for the agent to act after receiving it.

If delay results from the holder forwarding a check in an indirect way, such delay would be unreasonable; but if the check be forwarded in a reasonably direct route, the holder is not prejudiced because the check does not reach its destination promptly, owing to its being delayed, missent or lost in the mail without his fault.

If *A*, in Chicago, receives a check on the *X* Bank of New York on Monday, which leaves Chicago by mail on Tuesday addressed to the *Y* Bank of New York, to which bank it is not delivered until the following Monday, owing to some delay in the mail, and the *Y* Bank presents it for payment on the next day—Tuesday, there has not been any unreasonable delay; but if (disregarding holidays) there had been any longer delay in starting the check towards New York or in presenting it after its arrival, there would have been unreasonable delay.

The drawer or an indorser, by an express agreement or by an agreement implied from the circumstances, may prolong his liability beyond the period ordinarily implied by law.

As has been said, the drawer of a check is not absolutely discharged by unreasonable delay in presentment for payment, but only to the extent of the loss actually sustained by him by reason of the failure of the bank on which it is drawn. Thus if the bank should pay forty cents on the dollar, the drawer would be discharged only to the extent of sixty per cent. of the amount called for in the check, the holder being entitled to the forty per cent. paid by the bank. If the drawer did not have any money at all on deposit, he is not discharged by any delay in making presentment, or even if presentment never is made. In such a case, as the check would not have been paid if presented at once, the drawer has not sustained any loss by a failure to make presentment. Even if the bank would have paid the check if presented although without right to do so, the drawer then would have become a debtor to the bank for its amount; hence he is in no worse position if, instead of owing the bank, he is a debtor to the holder of the check. Similarly,

if the drawer of a check has directed the bank not to pay it, he would not be discharged by failure to present it promptly or if presentment never is made, as the check would not have been paid if presented so that the drawer is not in any worse position than if prompt presentment had been made. Besides, he cannot take advantage of his own wrong.

As in the case of any negotiable instrument (see, *ante*, §96), there may be circumstances which will excuse delay in presentment of a check for payment, such as inevitable accident resulting from the sudden illness or the death of the person who was about to make presentment, epidemics, war, or a removal of the bank to another place. In these cases, however, presentment should be made as soon as practicable, or the excuse will not avail the holder.

RIGHTS OF HOLDER AGAINST BANK.

108. The holder of an uncertified check does not possess any rights against the bank on which it is drawn.

The same rule applies to a check before certification (see, *post*, Appendix A, Negotiable Instruments Law, §325) as applies to an ordinary bill of exchange before acceptance (see, *ante*, §37)—the holder generally does not have any right of action against the drawee, even for a refusal to pay without good reason. (See Appendix B, Case No. 6.) The bank is not a party to the contract evidenced by a check, until it voluntarily becomes such. The holder's remedy, if any, is against the drawer and indorsers. (See Appendix B, Case No. 34.)

As has been said (*ante*, §106), if the holder of a check procures certification thereof the bank then becomes a party to the check and liable to the holder to the same extent as the acceptor of an ordinary bill of exchange; but, if certification is procured by anyone but the drawer, the drawer and prior indorsers, if any, are discharged. After certification

all those who become parties to it by indorsement or delivery are bound as the transferrors of an accepted bill of exchange would be.

When the holder of a check procures certification, he to a limited extent makes a choice between the financial responsibility of the bank and that of the drawer; though discredit is not thrown on the drawer by having a check certified. If the holder intends not to present the check promptly, it would be better for him to have it certified, as he then has the direct obligation of the bank, which is sufficient if the bank remains solvent. If the bank should fail, the drawer would be discharged by the delay in any event to the extent of the amount unpaid; and a certified check prevents the drawer from inadvertently or intentionally drawing out the amount represented by the check.

RIGHTS OF DRAWER AGAINST BANK—STOPPING PAYMENT.

109. The drawer of a check which has not been certified can direct the bank not to pay it when presented.

The drawer of a check, after delivering it, has the power and sometimes the right to stop its payment, that is, to direct the bank not to pay it, and the holder in such a case could not recover from the bank, or procure certification of the check. This action should not be taken by the drawer except for good cause, that is, in cases where the drawer, if he had paid cash, would have a right to recover his payment from the payee, or where the holder has lost the check or has had it stolen from him. If the drawer stops payment without right, he would be liable to the holder; and in any case where payment has been stopped, whether rightfully or wrongfully, if the check reaches a holder in due course, the drawer and indorsers would be liable to such holder. If a check not bearing an indorsement in blank should be lost or stolen, there could not be a holder thereof in due course. (See Appendix B, Case No. 18.)

The drawer cannot stop payment of a certified check; though there might be circumstances justifying an injunction restraining a bank from paying it and also restraining the holder from transferring it, or justifying garnishment of the funds held by the bank for the payee.

RIGHTS OF DRAWER AGAINST BANK—WRONGFUL REFUSAL TO PAY.

110. A bank which, without sufficient reason, refuses to pay a check when properly drawn and properly presented, renders itself liable to the drawer for any damage caused him by such refusal.

If the drawee named in an ordinary bill of exchange has previously agreed with the drawer to honor bills drawn on him, he is liable to the drawer for a breach of such contract (see, *ante,* §37) though not liable to a holder of the bill. This rule applies to checks drawn on a bank. Deposits are made in a bank under a contract, usually implied between the bank and the depositor that it will honor checks, when properly presented, if properly drawn against such deposit. (See, *ante,* §11.) A wrongful refusal of the bank to pay a check is a breach of this contract; and, as in the case of the breach of any contract, the injured party has a right of action for all damage he may have sustained as the direct result thereof. (See, *ante,* "Contracts," §94.) If the holder of a check is led to believe, by a refusal of the bank to pay it, that the drawer issued the check when he did not have sufficient funds on deposit to meet its payment, the drawer's credit might be greatly injured, and the error might cause him considerable loss of business as well as cause him to lose time and to incur expense in having the error rectified. Even if actual damage has not been sustained, the bank is liable for nominal damages. (See, *ante,* "Contracts," §94.) The bank is liable notwithstanding the error was

unintentional. If the bank acted maliciously in refusing to honor a check, it would be liable in tort as well as for a breach of contract; and exemplary damages might be recoverable in tort. (See, *ante,* "Contracts," §94.) The holder of a check is not a party to this contract to honor checks, and, as was said *ante,* in §108, has no right of action against the bank, his remedy being solely against the drawer, and indorsers if any.

RIGHT OF BANK TO REFUSE PAYMENT.

111. A bank is justified in refusing to pay a check if—
- Not in proper form; which may result from—
  - Improper signature.
  - Material alteration.
  - Forgery.
- Not properly presented; which would be the case if presented—
  - By one not the rightful holder.
  - Before its date.
- Deposit of drawer is insufficient.
- Authority to pay has been revoked;
  - By drawer expressly.
  - By death of drawer.

A bank, if acting in good faith, can require a person presenting a check for payment to identify himself.

A bank is justified in treating the deposit of the drawer as insufficient—
- If not large enough to pay a check in full.
- If not large enough to pay all checks presented at one time.
- If not large enough to pay a check after deducting a matured claim of the bank against the drawer.
- If not made in time to allow an entry thereof to be made upon the books of the bank.

A bank cannot be held liable for refusing to pay a check drawn upon it if it has acted reasonably. A bank can and should refuse to pay a check which is not properly signed. A check should be signed by the depositor himself or by his duly authorized agent; otherwise the bank would not have any right to charge the amount of the check against the depositor's account, unless the depositor is estopped in some way. (See, *ante,* "Agency," §21.) The name of a corporation should be signed by an officer duly authorized by its charter or by-laws. If the deposit was made by two or more jointly, such as trustees, all should sign, unless there is some arrangement to the contrary.

If a bank pays an altered check where the drawer was not negligent, or where title is claimed through a forgery, the bank must bear any loss, so far as the drawer is concerned; but, in such a case, the bank is entitled to recover from anyone participating in the wrongful act, and from the person to whom payment was actually made, although innocent, if there has not been any unreasonable delay in notifying him, or unless the forgery related to the signature of the drawer and the person paid was a holder in due course. A bank is presumed to know its depositors' signatures. (See, *ante,* §80.)

Payment of a check by a bank to one not rightfully entitled to receive payment would not discharge the instrument, and the bank could be compelled to pay the rightful holder; hence a bank has a right to require a person, presenting a check for payment, to identify himself if not known, though in this, as in other matters, the requirement of identification must not be unreasonable or made with a view of evading payment. If, however, an unindorsed check is paid to the rightful holder, the bank will be protected. (See, *ante,* §101.)

It is customary for a bank to ask the person receiving payment to write his signature on the back of the check, even though payable to bearer, as, in event of a subsequent dispute, this serves to identify the person to whom the money is paid. This signature is not necessarily an indorsement in the technical sense of the term, but rather a receipt.

A bank is not required to pay a post-dated check until the day of its date arrives, and should not do so. If such a check should be paid, the bank cannot charge its amount to the account of the drawer if, by so doing, the amount left on deposit is not sufficient to pay other checks presented before the day of its date.

If a post-dated check is paid before the day of its date, the bank runs the further risk of receiving instructions from the drawer not to pay it; and if a post-dated check payable to "bearer" is paid before the day of its date, the bank assumes the additional risk of ownership by the person paid, as some other person may subsequently claim to be the "bearer" intended, and compel a second payment by the bank.

A bank is justified in refusing to pay a check if it does not have any funds of the drawer in its possession; and, further, it is justified in a refusal to pay a check although there are some funds of the drawer on deposit if the deposit is less than the amount of the check, and although the holder of the check is willing to take the amount of the deposit in full payment. A check is not a divisible contract, and is payable either in full or not at all. If a bank refuses payment of a check because the funds of the drawer on deposit are not sufficient for that purpose and the holder can induce the bank to divulge the exact amount of such deposit, although the bank cannot be required to give the information, the holder can deposit the difference to the credit of the drawer and thus obtain payment of the check in full if he is willing to submit to this discount out of his own pocket.

Thus, if the holder of a check for $100, payment of which is refused because not sufficient funds, can ascertain that the amount of the drawer's deposit at the bank is $95, the holder by depositing, say, six dollars could obtain payment of the check in full, leaving a balance of one dollar in favor of the drawer. A bank will receive money from anyone without question for a depositor's account; and, in some cases, it might be good business for the holder to sacrifice a small sum where the probability of obtaining payment in full in any other manner is remote. If the bank will not give the information desired, it sometimes can be learned through a friend in some other bank. In many cases, however, information can be obtained directly from the bank on which the check is drawn, as banks do not care for depositors whose accounts are small or improperly used.

It is the duty of a bank to pay checks in full in the order of their receipt as long as the drawer's account is sufficient for that purpose. If presentment has been made by mail, the bank would not be justified in giving precedence to a later check while it has possession of another unpaid check, or in making an apportionment of the funds of the drawer among the holders. A bank is not justified in refusing to pay a check if there is sufficient on deposit to pay it, merely because other unpaid checks are known to be outstanding if the presentment of such other checks is not being made at that time; but if several checks by the same drawer are presented at once and his deposit is insufficient to pay one or more, the bank is justified in refusing to discriminate in favor of any holder, and can refuse to pay any of them. Hence when a check on one bank, having been deposited in another bank for collection, is returned marked "N. S. F." (not sufficient funds), it is good business for the holder immediately to present the check for payment at the bank on which it is drawn, as it might then be paid if the previous refusal resulted from a presentment of several checks at one time. If the holder is not acquainted at the bank on which

the check is drawn, let him ask to have the check certified, as he will then not have difficulty in obtaining payment at a later time.

Thus a depositor in the *A* Bank, with $400 to his credit, draws and delivers five checks for $100 each to different payees. These checks are deposited by the holders to their respective accounts in the *B* Bank for collection, so that they are all presented by the *B* Bank to the *A* Bank for payment at the same time, which is usually done through an institution known as a clearing-house. The *A* Bank will refuse payment of all the checks although able to pay any four of them in full, and would return all of them unpaid to the *B* Bank with the information that the funds of the drawer were insufficient. The *B* Bank then would notify the holders, returning the checks to them. If any one of these five holders, upon the return to him of the unpaid check, would immediately present it for payment at the *A* Bank, it would be paid, as there is sufficient to pay it at that time, and there are no other checks of the drawer in the bank at that time awaiting payment.

A depositor is simply a creditor of the bank to the extent of his balance; hence if the bank has a claim against a depositor and the claim is due in its own right so that the depositor becomes a debtor to the bank, the bank, in the absence of a special agreement to the contrary, has the right to apply the deposit towards the payment of such claim and to refuse payment of a check subsequently presented if the amount left to the depositor's credit is insufficient to pay such check. Where an instrument is made payable at a bank it is equivalent to an order to the bank to pay it for the account of the principal debtor therein. (See, *post,* Appendix A, Negotiable Instruments Law, §147.)

In a large banking institution some time must necessarily elapse between the receipt of a deposit and its entry on the books to the depositor's account, and the law allows the bank a reasonable time for that purpose. If a check is presented immediately after a deposit by the drawer and before there

has been time to make the proper entries on the books of the bank, and payment of a check is refused because the depositor's account appears not to show sufficient funds with which to pay it, the bank would not be liable for such refusal. It is good business, therefore, in many cases for the holder of a check to make a second presentment for payment after the first presentment has been unsuccessful. If a bank has several branches, one branch is not required to pay a check drawn against a deposit in another branch unless there has been an agreement by the bank authorizing such a presentment.

A bank is justified in refusing payment or certification of a check if the drawer has given instructions not to pay it, the remedy of the holder, if any, being against the drawer and the indorsers. (See, *ante,* §109.)

If the drawer of a check should die before presentment for payment, notice to the bank of the death would terminate the authority of the bank to pay checks (see, *ante,* "Agency," §66), and the bank is justified in refusing payment of all checks presented thereafter. The holder should present his claim against the estate of the decedent, whose personal representative is entitled to the deposit in the bank. (See Appendix B, Case No. 34.)

It is a very common practice for one depositor in a bank to deposit a check drawn on the same bank by another depositor, so that the bank becomes an agent for collecting a check drawn on itself. Merely receipting for the amount of such check does not prevent the bank from refusing to pay it and returning it to the one depositing it; and the bank has until the following business day to return it to the holder.

NOTICE OF DISHONOR.

112. Upon refusal of a bank to pay a check properly presented, prompt notice should be given to the drawer

and to indorsers. Otherwise indorsers will be discharged, and the drawer will be discharged if prejudiced by lack of notice.

Good business requires that, in all cases, prompt notice of a refusal of a bank to pay a check, whether rightful or wrongful, should be given to the drawer and to each indorser thereof, not later than the next business day after such refusal, in order that they may take any necessary steps to protect themselves. The law makes the same distinction here between the indorsers, if any, of a check and the drawer thereof, as it does in regard to delay in the presentment of a check for payment. (See, *ante,* §107.) Indorsers must be notified promptly and in the same manner as in the case of an ordinary bill of exchange (see, *ante,* §§92, 94), or they will be completely discharged; the drawer, however, is not discharged from liability to the holder unless the drawer is injured by lack of notice, and then only to the extent of such injury.

If the drawer knows of the existence of facts which would result in non-payment of a check drawn by him, such as a suspension of the bank, not only is presentment excused (see, *ante,* §107) but he is not entitled to notice of non-payment if presented. [See, *post,* Appendix A, Negotiable Instruments Law, §185(4).] If he does not know of the fact, he is entitled to notice. (See Appendix B, Case No. 35.) The drawer would be presumed to know that a check will not be paid if he does not have sufficient funds on deposit for its payment, or if he has directed the bank not to pay it. [See, *post,* Appendix A, Negotiable Instruments Law, §185(5).] If a depositor withdraws his account from a bank he should leave sufficient funds therein for the payment of outstanding checks, or else be prepared to take them up. Matters excusing notice entirely or excusing de-

lay in giving notice of the dishonor of a check are similar to those applying to an ordinary bill of exchange. (See, *ante*, §96.)

BIBLIOGRAPHIC NOTE.

Students desiring to read a more complete treatise devoted to the subject of Negotiable Instruments are referred to Norton on Bills and Notes (fourth edition); or, if a still larger work is desired, to Daniel on Negotiable Instruments (sixth edition), two volumes.

APPENDIX A.

THE NEGOTIABLE INSTRUMENTS LAW.

The following code is in force at the present time in all of the States and Territories with the exception of Georgia, Porto Rico, and Texas.

In many of the jurisdictions which have adopted the code, changes have been made in the numbering of the sections, and, in some cases, the language has been altered. In a few jurisdictions some of the sections given herein are omitted, and sometimes new sections have been added.

Cross-references in brackets, following the sections of the Statute, are not a part of it, but are inserted merely as an aid to the student.

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ARTICLE I.

GENERAL PROVISIONS.

Section 1. *Short Title.* This act shall be known as the Negotiable Instruments Law. [See text, §6.]

Section 2. *Definitions and Meaning of Terms.* In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification. [See, *post,* §220. See also, text, §38.]

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not. [See, *post,* §§72, 135, 147, 321. See also, text, §9.]

"Bearer" means the person in possession of a bill or note which is payable to bearer. [See text, §15.]

"Bill" means bill of exchange, and "note" means negotiable promissory note. [See text, §9.]

"Delivery" means transfer of possession, actual or constructive, from one person to another. [See, *post,* §§34, 35.]

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof. [See, *post,* §§60, 90, 97, 116, 132, 144, 163, 200, 203, 248, 324. See also, text, §§15, 69.]

"Indorsement" means an indorsement completed by delivery. [See, *post,* §60. See also, text, §47.]

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not. [See, *post,* §§210, 320. See also, text, §9.]

"Value" means valuable consideration. [See, *post,* §§51, 52.]

"Written" includes printed, and "writing" includes print. [See, *post,* §20 (1). See also, text, §22.]

Section 3. *Person Primarily Liable on Instrument.* The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable. [See, *post,* §§130, 132, 201, 202. See also, text, §16; and, Appendix B. Case No. 22.]

Section 4. *Reasonable Time, What Constitutes.* In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. [See, *post,* §§131, 322. See also, text, §§74, 87.]

Section 5. *Time, How Computed; When Last Day Falls on Holiday.* Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day. [See, *post,* §§131, 145, 174, 175, 224, 243, See also, text, §93.]

Section 6. *Application of Chapter.* The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Section 7. *Law Merchant; When Governs.* In any case not provided for in this act the rules of the law merchant shall govern. [See text, §7.]

ARTICLE II.

FORM AND INTERPRETATION.

Section 20. *Form of Negotiable Instrument.* An instrument to be negotiable must conform to the following requirements: [see, *post,* §§330, 331. See also, Appendix B, Case No. 3.]

1. It must be in writing and signed by the maker or drawer; [see, *ante,* §2 "Written," and, *post,* §§37, 38, 42, 210, 320. See also, text, §22.]

2. Must contain an unconditional promise or order to pay a sum certain in money; [see, *post,* §§21, 22, 23, 25 (5), 36 (1), 210, 320. See also, text, §§25, 26.]

3. Must be payable on demand, or at a fixed or determinable future time; [see, *post,* §§23, 26, 210, 320. See also, text, §29.]

4. Must be payable to order or to bearer; and [see, *post,* §§27, 28, 66, 210, 320. See also, text, §32.]

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein, with reasonable certainty. [See text, §31.]

Section 21. *Certainty as to Sum; What Constitutes.* The sum payable is a sum certain within the meaning of this act, although it is to be paid: [see, *ante,* §20, (2); and, *post,* §25 (5).]

1. With interest; or [see text, §25.]
2. By stated installments; or [see text, §28.]
3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or [see text, §28.]
4. With exchange, whether at a fixed rate or at the current rate; or [see text, §25.]
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. [See text, §25.]

Section 22. *When Promise Is Unconditional.* An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: [see, *ante,* §20 (2).]

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or [see text, §26.]
2. A statement of the transaction which gives rise to the instrument. [See, *post,* §§330, 331. See also, text, §§26, 36; see, also, Appendix B, Case No. 3.]

But an order or promise to pay out of a particular fund is not unconditional. [See text, §26.]

Section 23. *Determinable Future Time; What Constitutes.* An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: [see, *ante,* §20 (3).]

1. At a fixed period after date or sight; or [see, *post,* §240 (1). See also, text, §29.]
2. On or before a fixed or determinable future time specified therein; or [see text, §30.]
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. [See text, §27.]

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. [See, *ante,* §20 (2). See also, text, §26.]

Section 24. *Additional Provisions Not Affecting Negotiability.* An instrument which contains an order or promise to

do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: [see text, §23.]

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or [see text, §24.]

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or [see text, §24.]

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or [see text, §24.]

4. Gives the holder an election to require something to be done in lieu of payment of money. [See text, §23.]

But nothing in this section shall validate any provision or stipulation otherwise illegal. [See text, §23.]

Section 25. *Omissions; Seal; Particular Money.* The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or [see, *post,* §§31, 32, 36 (2) (3). See also, text, §36.]

2. Does not specify the value given, or that any value has been given therefor; or [see, *post,* §50. See also, text, §24.]

3. Does not specify the place where it is drawn or the place where it is payable; or [see text, §36.]

4. Bears a seal; or [see text, §36.]

5. Designates a particular kind of current money in which payment is to be made. [See text, §23.]

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. [See, *post,* §§330, 331.]

Section 26. *When Payable on Demand.* An instrument is payable on demand: [See, *ante,* §20 (3); and, *post,* §321.]

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or [see text, §29.]

2. In which no time for payment is expressed. [See text, §29.]

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. [See, *post,* §§131, 226. See also, text, §§29, 87.]

Section 27. *When Payable to Order.* The instrument is payable to order where it is drawn payable to the order of a

specified person or to him or his order. It may be drawn payable to the order of: [see, *ante,* §20 (4).]

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or [see, *post,* §§114 (2), 320. See also, text, §31.]
3. The drawee; or [see, *post,* §186 (2). See also, text, §31.]
4. Two or more payees jointly; or [see text, §31.]
5. One or some of several payees; or [see text, §31.]
6. The holder of an office for the time being. [See text, §31.]

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty. [See text, §§31, 32.]

Section 28. *When Payable to Bearer.* The instrument is payable to bearer: [See *ante,* §20 (4); and, *post,* §§60, 70.]

1. When it is expressed to be so payable; or [see text, §31.]
2. When it is payable to a person named therein or bearer; or [see text, §32.]
3. When it is payable to the order of a fictitious or non-existing person, and such fact was know to the person making it so payable; or [see text, §31; see, also, Appendix B, Case No. 5.]
4. When the name of the payee does not purport to be the name of any person; or [see text, §31.]
5. When the only or last indorsement is an indorsement in blank. [See, *post,* §64. See also, text, §49; and Appendix B, Case No. 19.]

Section 29. *Terms, When Sufficient.* The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof. [See text, §§32, 33.]

Section 30. *Date, Presumption, as to.* Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be. [See, *post,* §§75, 91 (1). See also, text, §§36, 38, 78, 81.]

Section 31. *Ante-Dated and Post-Dated.* The instrument is not invalid for the reason only that it is ante-dated or post-

dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. [See, *post,* §25 (1). See also, text, §§36, 107.]

Section 32. *When Date May Be Inserted.* Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not void the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. [See, *ante,* §25 (1.); and, *post,* §§32 (3), 33, 91 (1), 96, 206 (1). See also, text, §§36, 38, 81.]

Section 33. *Blanks, When May Be Filled.* Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. [See, *ante,* §32; and *post,* §§34, 91 (1), 96, 205, 206, 226. See also, text, §§73, 81.]

Section 34. *Incomplete Instrument Not Delivered.* Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. [See, *ante,* §§2 "Delivery," 33; and, *post,* §§35, 205. See also, text, §§80, 81].

Section 35. *Delivery: When Effectual: When Presumed.*

Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. [See, *ante,* §§2 "Delivery," 34; and, *post,* §§60, 91 (1), 96, 225. See also, text, §81; and Appendix B, Case No. 19.]

Section 36. *Construction Where Instrument Is Ambiguous.* Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply: [see, *ante,* §29.]

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount; [see text, §25.]

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof; [see, *ante,* §32. See also, text, §101.]

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued; [see, *ante,* §32. See also, text, §36.]

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election; [see, *post,* §214. See also, text, §18.]

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser; [see, *post*, §§61, 113, 114. See also, text, §46.]

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Section 37. *Liability of Person Signing in Trade or Assumed Name.* No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. [See, post, §§38, 42, 61, 71, 72, 79, 115. See also, text, §31.]

Section 38. *Signature by Agent; Authority; How Shown.* The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. [See, *post*, §§40, 71. See also, text, §31.]

Section 39. *Liability of Person Signing as Agent, etc.* Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. [See, *post*, §§74, 119. See also, text, §31.]

Section 40. *Signature by Procuration; Effect of.* A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [See text, §31.]

Section 41. *Effect of Indorsement by Infant or Corporation.* The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. [See, *post*, §§110, 111, 112 (2), 115 (3), 116 (1). See also, text, §58.]

Section 42. *Forged Signature; Effect of.* Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. [See, *ante,* §37; and, *post,* §112 (1). See also, text, §80.]

ARTICLE III.
CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

Section 50. *Presumption of Consideration.* Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value. [See, *ante,* §25 (2); and, *post,* §§52, 54, 96. See also, text, §§36, 59, 77; and Appendix B, Case No. 34.]

Section 51. *Consideration; What Constitutes.* Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time. [See, *ante,* §2 "Value"; and, *post,* §§52, 53. See also, text, §76.]

Section 52. *What Constitutes Holder for Value.* Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. [See, *ante,* §§2, "Value," 50. See also, text, §81.]

Section 53. *When Lien on Instrument Constitutes Holder for Value.* Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. [See text, §76.]

Section 54. *Effect of Want of Consideration.* Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise. [See, *ante,* §50; and, *post,* §96. See also, text, §81.]

Section 55. *Liability of Accommodation Party.* An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. [See, *post,* §§114 (3), 140, 186 (3), 202 (2). See also, text, §16.]

ARTICLE IV.
NEGOTIATION.

Section 60. *What Constitutes Negotiation.* An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery. [See, *ante,* §§2 "Holder," "Indorsement," 28, 35; and, *post,* §§70, 79, 332. See also, text, §§46, 62.]

Section 61. *Indorsement; How Made.* The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. [See, *ante,* §§36(6), 37. See also, text, §§46, 49, 54.]

Section 62. *Indorsement Must Be of Entire Instrument.* The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue. [See text, §47.]

Section 63. *Kinds of Indorsement.* An indorsement may be either special or in blank; and it may also be either restrictive or qualified or conditional. [See, *post,* §§64, 66, 68, 69. See also, text, §49.]

Section 64. *Special Indorsement; Indorsement in Blank.* A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the in-

strument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. [See, *ante,* §28 (5); and, *post,* §§65, 70. See also, text, §49.]

Section 65. *Blank Indorsement; How Changed to Special Indorsement.* The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. [See, *ante,* §64. See also, text, §49.]

Section 66. *When Indorsement Restrictive.* An indorsement is restrictive, which either: [see, *post,* §67. See also, text, §50.]

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive. [See, *post,* §77. See also, text, §47.]

Section 67. *Effect of Restrictive Indorsement; Rights of Indorsee.* A restrictive indorsement confers upon the indorsee the right: [see, *ante,* §66.]

1. To receive payment of the instrument; [see text, §50.]
2. To bring any action thereon that the indorser could bring; [see, *post,* §90. See also, text, §50.]
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. [See text, §50.]

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. [See, *post,* §77. See also, text, §50.]

Section 68. *Qualified Indorsement.* A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. [See, *post,* §§77, 115. See also, text, §§51, 73.]

Section 69. *Conditional Indorsement.* Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or

his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. [See text, §50.]

Section 70. *Indorsement of Instrument Payable to Bearer.* Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. [See, *ante,* §§28, 60, 64; and, *post,* §117. See also, text, §49.]

Section 71. *Indorsement Where Payable to Two or More Persons.* Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. [See, *ante,* §§37, 38. See also, text, §56.]

Section 72. *Effect of Instrument Drawn or Indorsed to a Person as Cashier.* Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. [See, *ante,* §2 "Bank." See also, text, §31.]

Section 73. *Indorsement Where Name is Misspelled, et cetera.* Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature. [See text, §§31, 47.]

Section 74. *Indorsement in Representative Capacity.* Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. [See, *ante,* §§39, 68. See also, text, §58.]

Section 75. *Time of Indorsement; Presumption.* Except where an indorsement bears date after maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue. [See, *ante,* §§30, 98. See also, text, §78.]

Section 76. *Place of Indorsement; Presumption.* Except where the contrary appears every indorsement is presumed

prima facie to have been made at the place where the instrument is dated. [See text, §94.]

Section 77. *Continuation of Negotiable Character.* An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. [See, *ante,* §§66, 67, 68, 148, 200; and, *post,* §332. See also, text, §8.]

Section 78. *Striking Out Indorsement.* The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [see, *post,* §§201(2) (3), 202. See also, text, §§60, 102.]

Section 79. *Transfer Without Indorsement; Effect of.* Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. [See, *ante,* §§60, 61. See also, text, §§65, 72.]

Section 80. *When Prior Party May Negotiate Instrument.* Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. [See, *post,* §§200(5), 202. See also, text, §57.]

ARTICLE V.
RIGHTS OF HOLDER.

Section 90. *Right of Holder to Sue; Payment.* The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument. [See, *ante,* §§2 "Holder," 67 (2); and, *post,* §§200, 248, 310. See also, text, §§5, 101.]

Section 91. *What Constitutes a Holder in Due Course.* A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face; [see, *ante,*

§§20, 30, 32, 33, 35. See also, text, §73.]

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; [see, *ante,* §91(2); and, *post,* §§92, 131, 188, 322. See also, text, §§74, 75.]

3. That he took it in good faith and for value; [see, *post,* §95. See also, text, §69.]

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. [See, *post,* §§93, 94, 95, 96, 97, 330, 331. See also, text, §69.]

Section 92. *When Person Not Deemed Holder in Due Course.* Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. [See, *ante,* §26; and, *post,* §§131, 322. See also, text, §74.]

Section 93. *Notice Before Full Amount Paid.* Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. [See text, §72.]

Section 94. *When Title Defective.* The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. [See, *post,* §§115 (3), 116 (1), 148, 314. See also, text, §55.]

Section 95. *What Constitutes Notice of Defect.* To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. [See, *ante,* §33; and, *post,* §148. See also, text, §70; and Appendix B, Case No. 15.]

Section 96. *Rights of Holder in Due Course.* A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior par-

ties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. [See, *ante*, §§32, 33, 35, 50, 54, 94; and, *post*, §§203, 205, 313, 314. See also, text, §68; and Appendix B, Case No. 15.]

Section 97. *When Subject to Original Defenses.* In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. [See, *ante*, §§2 "Holder," 94; and, *post*, §§330, 331. See also, text, §69.]

Section 98. *Who Deemed Holder in Due Course.* Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. [See, *ante*, §§75, 94, 97. See also, text, §§5, 77.]

ARTICLE VI.
LIABILITIES OF PARTIES.

Section 110. *Liability of Maker.* The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse. [See, *ante*, §41; and, *post*, §130. See also, text, §58.]

Section 111. *Liability of Drawer.* The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder. [See, *ante*, §§2 "Holder," 41; and, *post*,

§§130, 144, 160, 187, 188, 202, 241, 247, 260, 324. See also, text, §§19, 58, 82; and Appendix B, Case No. 34.]

Section 112. *Liability of Acceptor.* The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: [see *post,* §§130, 220, 311, 313, 314, 323. See also, text, §37.]

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and [see, *ante,* §42. See also, text, §43.]

2. The existence of the payee and his then capacity to indorse. [See, *ante,* §41. See also, text, §§43, 58.]

Section 113. *When Person Deemed Indorser.* A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. [See, *ante,* §36 (6); and, *post,* §§70, 114, 130, 160. See also, text, §46; and, Appendix B, Case No. 22.]

Section 114. *Liability of Irregular Indorser.* Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: [see, *ante,* §§36 (6), 113; and, *post,* §§114, 116, 130, 160. See also, text, §52.]

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. [See, *post,* §118.]

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. [See, *post,* §§118, 320.]

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. [See, *ante,* §55; and, *post,* §§118, 202 (2). See also, text, §52.]

Section 115. *Warranty; Where Negotiation by Delivery, et cetera.* Every person negotiating an instrument by delivery or by a qualified indorsement, warrants: [see, *ante,* §68; and, *post,* §§116, 119.]

1. That the instrument is genuine and in all respects what it purports to be; [see, *ante,* §§30, 32, 33, 34, 35, 42. See also, text, §63.]

2. That he has a good title to it; [see, *ante,* §94. See also, text, §63.]

3. That all prior parties had capacity to contract; [see, *ante,* §41. See also, text, §63.]

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. [See, *post,* §§205, 314. See also, text, §63.]

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes. [See text, §63.]

Section 116. *Liability of General Indorser.* Every indorser who indorses without qualifications, warrants to all subsequent holders in due course: [see, *ante,* §§70, 114, 117, 118; and, *post,* §312. See also, text, §56.]

1. The matter and things mentioned in subdivisions one, two, and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting. [See, *post,* §§205, 314. See also, text, §63.]

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. [See, *ante,* §§2 "Holder," 70; and, *post,* §§130, 144, 160, 241, 260, 324. See also, text, §§61, 82.]

Section 117. *Liability of Indorser Where Paper Negotiable by Delivery.* Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. [See, *ante,* §§70, 116. See also, text, §§49, 54.]

Section 118. *Order in Which Indorsers Are Liable.* As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. [See, *ante,* §§114 (1) (2) (3), 116, 201 (3) (4), 202. See also, text, §§46, 52, 56, 102.]

Section 119. *Liability of Agent or Broker.* Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section 115 of

this act, unless he discloses the name of his principal, and the fact that he is acting only as agent. [See text, §62.]

ARTICLE VII.

PRESENTMENT FOR PAYMENT.

Section 130. *Effect of Want of Demand on Principal Debtor.* Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. [See, *ante,* §§3, 110, 111, 112, 113, 114, 116; and, *post,* §§139, 140, 142, 241, 248. See also, text, §§82, 87.]

Section 131. *Presentment Where Instrument Is Not Payable on Demand; [Where Payable on Demand].* Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. [See, *ante,* §§4, 5, 26, 92; and, *post,* §§139, 140, 142, 145, 146, 322. See also, text, §87.]

Section 132. *What Constitutes Sufficient Presentment.* Presentment for payment, to be sufficient, must be made: [see, *post,* §243.]

1. By the holder, or by some person authorized to receive payment on his behalf; [see, *ante,* §2 "Holder"; and, *post,* §161. See also, text, §85.]

2. At a reasonable hour on a business day; [see, *post,* §§135, 174 (1) (2), 242. See also text, §87.]

3. At a proper place as herein defined; [see, *post,* §133. See also, text, §86.]

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. [See, *ante,* §§3, 110, 112; and, *post,* §§136, 137, 215. See also, text, §88.]

Section 133. *Place of Presentment.* Presentment for pay-

ment is made at the proper place: [see, *ante,* §132 (3).]

1. Where a place of payment is specified in the instrument and it is there presented; [see text, §86. See also, Appendix B, Case No. 23.]

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented; [see text, §86.]

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; [see text, §86.]

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. [See text, §86.]

Section 134. *Instrument Must Be Exhibited.* The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. [See, *post,* §314. See also, text, §§81, 89.]

Section 135. *Presentment Where Instrument Payable at Bank.* Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. [See, *ante,* §2 "Bank"; and, *post,* §147. See also, text, §87.]

Section 136. *Presentment Where Principal Debtor Is Dead.* Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. [See, *post,* §§169, 242 (2). See also, text, §88; and Appendix B, Case No. 29.]

Section 137. *Presentment to Persons Liable as Partners.* Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. [See, *post,* §170. See also, text, §88.]

Section 138. *Presentment to Joint Debtors.* Where there are several persons not partners, primarily liable on the instru-

ment, and no place of payment is specified, presentment must be made to them all. [See, *post,* §171. See also, text, §88.]

Section 139. *When Presentment Not Required to Charge the Drawer.* Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. [See, *post,* 185 (4). See also, text, §96.]

Section 140. *When Presentment Not Required to Charge the Indorser.* Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. [See, *ante,* §55; and, *post,* §186 (3). See also, text, §96.]

Section 141. *When Delay in Making Presentment Is Excused.* Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his fault, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. [See, *post,* §§184, 244, 267. See also, text, §96.]

Section 142. *When Presentment May Be Dispensed with.* Presentment for payment is dispensed with: [see, *ante,* §§139, 140, 248.]

1. Where after the exercise of reasonable diligence presentment as required by this act can not be made; [see, *ante,* §§136, 183, 245 (2). See also, text, §96; and, Appendix B, Case No. 29.]

2. Where the drawee is a fictitious person; [see, *post,* §§185 (2), 214, 245 (1). See also, text, §96.]

3. By waiver of presentment express or implied. [See, *post,* §§180, 182. See also, text, §96.]

Section 143. *When Instrument Dishonored by Non-Payment.* The instrument is dishonored by non-payment when: [see, *post,* §§246, 260.]

1. It is duly presented for payment and payment is refused or can not be obtained; or [see, *ante,* §§136, 142 (1); and, *post,* §144. See also, text, §96.]

2. Presentment is excused and the instrument is overdue and unpaid. [See, *ante,* §§139, 140, 142 (2) (3). See also, text, §61; and, Appendix B, Case No. 29.]

Section 144. *Liability of Person Secondarily Liable, When Instrument Dishonored.* Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder. [See, *ante,* §§2 "Holder," 111, 114, 116, 143, 160, 180. See also, text, §82.]

Section 145. *Time of Maturity.* Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday. [See, *ante,* §5; and, *post,* §§146, 243, 322. See also, text, §87.]

Section 146. *Time; How Computed.* Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. [See, *ante,* §145; and, *post,* §§240 (1), 242.]

Section 147. *Rule Where Instrument Payable at Bank.* Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. [See, *ante,* §§2 "Bank," 135. See also, text, §§101, 111.]

Section 148. *What Constitutes Payment in Due Course.* Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. [See, *ante,* §§94, 95; and, *post,* §200 (1) (2). See also, text, §101.]

ARTICLE VIII.

NOTICE OF DISHONOR.

Section 160. *To Whom Notice of Dishonor Must Be Given.* Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not

given is discharged. [See, *ante,* §§111, 113, 114, 116, 143, 144; and *post,* §§167, 168, 180, 182, 183, 185, 186, 187, 230, 246, 247. See also, text, §90; and, Appendix B, Cases No. 27, 29 and 35.]

Section 161. *By Whom Given.* The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. [See, *ante,* §132 (1); and, *post,* §§162, 163. See also, text, §91.]

Section 162. *Notice Given by Agent.* Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. [See, *ante,* §161. See also, text, §91.]

Section 163. *Effect of Notice Given on Behalf of Holder.* Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. [See, *ante,* §2 "Holder"; and, *post,* §164. See also, text, §91.]

Section 164. *Effect Where Notice Is Given by Party Entitled Thereto.* Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given. [See, *ante,* §163. See also, text, §91.]

Section 165. *When Agent May Give Notice.* Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. [See, *post,* §§174, 175. See also, text, §93.]

Section 166. *When Notice Sufficient.* A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. [See, *post,* §167. See also, text, §92.]

Section 167. *Form of Notice.* The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails. [See, *ante,* §166; and, *post,* §§174 (3), 175, 176, 177, 179. See also, text, §92.]

Section 168. *To Whom Notice May Be Given.* Notice of dishonor may be given either to the party himself or to his agent in that behalf. [See, *ante,* §160; and, *post,* §§170, 171. See also, text, §90.]

Section 169. *Notice Where Party Is Dead.* When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. [See, *ante,* §136. See also, text, §§90, 94.]

Section 170. *Notice to Partners.* Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution. [See, *ante,* §§137, 168; and, *post,* §171. See also, text, §90.]

Section 171. *Notice to Persons Jointly Liable.* Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. [See, *ante,* §§138, 168, 170; and, *post,* §242 (1). See also, text, §90.]

Section 172. *Notice to Bankrupt.* Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. [See, *post,* §242 (3). See also, text, §90.]

Section 173. *Time Within Which Notice Must Be Given.* Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act. [See, *ante,* §165, and, *post,* §§174, 175, 178, 184. See also text, §93.]

Section 174. *Where Parties Reside in Same Place.* Where the person giving and the person to receive notice re-

side in the same place, notice must be given within the following times: [See *post,* §§175, 184.]

1. If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; [see text, §93.]

2. If given at his residence, it must be given before the usual hours of rest on the day following; [see text, §93.]

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following. [See, *ante,* §5; and, *post,* §§176, 177. See also, text, §93.]

Section 175. *Where Parties Reside in Different Places.* Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: [see, *ante,* §174; and, *post,* §184.]

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter. [See, *post,* §§176, 177. See also, text, §93.]

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision. [See, *ante,* §5. See also, text, §93.]

Section 176. *When Sender Deemed to Have Given Due Notice.* Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. [See text, §93.]

Section 177. *Deposit in Post-Office; What Constitutes.* Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department. [See text, §93.]

Section 178. *Notice to Subsequent Party; Time of.* Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. [See, *ante,* §§174, 175. See also, text, §93.]

Section 179. *Where Notice Must Be Sent.* Where a party has added an address to his signature, notice of dishonor must

be sent to that address; but if he has not given such address, then the notice must be sent as follows: [see, *ante,* §169. See also, text, §94.]

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or [see text, §94.]

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or [see text, §94.]

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning. [See text, §94.]

But where the notice is actually received by the party within the time specified in this act, it will be sufficient though not sent in accordance with the requirements of this section. [See text, §94.]

Section 180. *Waiver of Notice.* Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied. [See, *ante,* §142 (3); and, *post,* §§181, 182, 185, 186, 187, 267. See also, text, §97.]

Section 181. *Who Affected by Waiver.* Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. [See text, §97.]

Section 182. *Waiver of Protest.* A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor. [See, *ante,* §142 (3); and, *post,* §267. See also, text, §97.]

Section 183. *When Notice Is Dispensed with.* Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. [See, *ante,* §§142 (1), 176; and, *post,* §§184, 185, 186, 187, 188, 245 (2), 267. See also, text, §§93, 96.]

Section 184. *Delay in Giving Notice; How Excused.* Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. [See, *ante,* §141; and, *post* §§244, 267. See also, text, §96.]

Section 185. *When Notice Need Not Be Given to Drawer.* Notice of dishonor is not required to be given to the drawer in either of the following cases: [see, *ante,* §§139, 180, 182, 183; and *post,* §267.]

1. Where the drawer and drawee are the same person; [see text, §96.]

2. Where the drawee is a fictitious person or a person not having capacity to contract; [see, *ante,* §142 (2); and, *post,* §§186 (1), 214, 245 (1). See also, text, §96.]

3. Where the drawer is the person to whom the instrument is presented for payment; [see, *post,* §186 (2). See also, text, §96.]

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; [see, *ante,* §139. See also, text, §§96, 112.]

5. Where the drawer has countermanded payment. [See text, §§96, 112.]

Section 186. *When Notice Need Not Be Given to Indorser.* Notice of dishonor is not required to be given to an indorser in either of the following cases: [see, *ante,* §§140, 180, 182, 183; and, *post,* §267.]

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; [see, *ante,* §§142 (2), 185 (2); and, *post,* 245 (1). See also, text, §96.]

2. Where the indorser is the person to whom the instrument is presented for payment; [see, *ante,* §185 (3). See also, text, §96.]

3. Where the instrument was made or accepted for his accommodation. [See, *ante,* §§55, 140. See also, text, §96.]

Section 187. *Notice of Non-Payment Where Acceptance Refused.* Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted. [See, *post,* §265. See also, text, §93.]

Section 188. *Effect of Omission to Give Notice of Non-Acceptance.* An omission to give notice of a dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission. [See, *ante,* §91 (2); and, *post,* §267. See also, text, §§81, 93.]

Section 189. *When Protest Need Not Be Made; When Must Be Made.* Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange. [See, *post,* §§213, 247, 260. See also, text, §95.]

ARTICLE IX.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

Section 200. *Instrument; How Discharged.* A negotiable instrument is discharged: [see, *ante,* §90; and, *post,* §§201, 315.]

1. By payment in due course by or on behalf of the principal debtor; [see, *ante,* §§134, 148; and, *post,* §§202 (1), 311. See also, text, §101.]

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; [see, *ante,* §§55, 134, 148; and, *post,* §202 (2). See also, text, §§16, 101.]

3. By the intentional cancellation thereof by the holder; [see, *post,* §§203, 204. See also, text, §101.]

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. [See, *ante,* §§2 "Holder," 80. See also, text, §§80, 101.]

Section 201. *When Person Secondarily Liable on, Discharged.* A person secondarily liable on the instrument is discharged: [see, ante, §§80, 201; and, *post,* §230.]

1. By any act which discharges the instrument; [see, *ante,* §200. See also, text, §102.]

2. By the intentional cancellation of his signature by the holder; [see, *ante,* §78; and, *post,* §204. See also, text, §102.]

3. By the discharge of a prior party; [See, *ante,* §§78, 118. See also, text, §§60, 102.]

4. By a valid tender of payment made by a prior party; [see, *ante,* §§118, 130; and, *post,* §305. See also, text, §102.]

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; [see text, §102.]

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved. [See, *ante,* §3. See also, text, §102; and, Appendix B, Case No. 22.]

Section 202. *Right of Party Who Discharges Instrument.* Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except: [see, *ante,* §§78, 80, 118, 134. See also text, §102.]

1. Where it is payable to the order of a third person, and has been paid by the drawer; and,

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated. [See, *ante,* §§3, 55, 114(3), 200(2).]

Section 203. *Renunciation by Holder.* The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. [See, *ante,* §§2 "Holder," 96, 200(3). See also, text, §§80, 101.]

Section 204. *Cancellation; Unintentional; Burden of Proof.* A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative, but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority. [See, *ante,* §§200 (3), 201 (2); and, *post,* §205. See also, text, §103.]

Section 205. *Alteration of Instrument; Effect of.* Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument

has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. [See, *ante,* §§34, 91, 96, 116(2), 204; and *post,* §§206, 230. See also, text, §§80, 101; and Appendix B, Case No. 19.]

Section 206. *What Constitutes a Material Alteration.* Any alteration which changes: [see, *ante,* §§33, 34, 205. See also, text, §80.]

1. The date; [see, *ante,* §32.]
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. [See, *post,* §§229, 230.]

ARTICLE X.

BILLS OF EXCHANGE—FORM AND INTERPRETATION.

Section 210. *Bill of Exchange Defined.* A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. [See, *ante,* §§2 "Person," 20, 21, 22, 23, 26, 27, 28, 36(5); and, *post,* §§310, 321. See also, text, §9.]

Section 211. *Bill Not an Assignment of Funds in Hands of Drawee.* A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof and the drawee is not liable on the bill unless and until he accepts the same. [See, *post,* §§220, 325. See also, text, §§5, 19, 37.]

Section 212. *Bill Addressed to More Than One Drawee.* A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession. [See, *post,* §242 (1). See also, text, §31.]

Section 213. *Inland and Foreign Bills of Exchange.* An inland bill of exchange is a bill which is, or on its face pur-

ports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. [See *ante*, §189, and, *post*, §260. See also, text, §13.]

Section 214. *When Bill May Be Treated as Promissory Note.* Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. [See, *ante*, §§36 (5), 142 (2), 185 (2); and, *post*, §320. See also, text, §18.]

Section 215. *Referee in Case of Need.* The drawer of a bill and any indorser may insert thereon the name of person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit. [See, *post*, §§280, 286.]

ARTICLE XI.

ACCEPTANCE OF BILLS OF EXCHANGE.

Section 220. *Acceptance; How Made, et cetera.* The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. [See, *ante*, §§2 "Acceptance," 32, 112, 211; and, *post*, §§221, 223, 226, 240, 242, 280, 323. See also, text, §38.]

Section 221. *Holder Entitled to Acceptance on Face of Bill.* The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. [See, *post*, §§222, 223, 313. See also, text, §38.]

Section 222. *Acceptance by Separate Instrument.* Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. [See, *ante*, §221; and, *post*, §223. See also, text, §38.]

Section 223. *Promise to Accept; When Equivalent to Acceptance.* An unconditional promise in writing to accept a bill

before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. [See, *ante,* §222. See also, text, §38.]

Section 224. *Time Allowed Drawee to Accept.* The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation. [See, *ante,* §5; and, *post,* §§225, 247. See also, text, §38.]

Section 225. *Liability of Drawee Retaining or Destroying Bill.* Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same. [See, *ante,* §224. See also, text, §40.]

Section 226. *Acceptance of Incomplete Bill.* A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. [See, *ante,* §§33, 34, 143, 222, 223; and, *post,* §§246, 247. See also, text, §38.]

Section 227. *Kinds of Acceptances.* An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. [See, *post,* §§228, 229, 230. See also, text, §39.]

Section 228. *What Constitutes a General Acceptance.* An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere. [See, *ante,* §227; and, *post,* §229 (3). See also, text, §39.]

Section 229. *Qualified Acceptance.* An acceptance is qualified, which is: [see, *ante,* §227, and *post,* §230. See also, text, §39.]

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; [see, *post,* §280.]

3. Local, that is to say, an acceptance to pay only at a particular place; [see, *ante,* §228.]

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all. [See, *post,* §242(1).]

Section 230. *Rights of Parties as to Qualified Acceptance.* The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto. [See, *ante,* §§160, 227, 229; and, *post,* §§245(1), 246. See also, text, §39.]

ARTICLE XII.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

Section 240. *When Presentment for Acceptance Must Be Made.* Presentment for acceptance must be made: [see, *ante,* §220; and, *post,* §245. See also, text, §84.]

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or, [see, *ante,* §146.]

2. Where the bill expressly stipulates that it shall be presented for acceptance; or,

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. [See, *post,* §§244, 264.]

In no other case is presentment for acceptance necessary, in order to render any party to the bill liable.

Section 241. *When Failure to Present Releases Drawer and Indorser.* Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance

or negotiate it within a reasonable time. If he fails to do so the drawer and all indorsers are discharged. [See, *ante*, §§4, 111, 130; and, *post*, §244. See also, text, §87.]

Section 242. *Presentment; How Made.* Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and [see, *ante*, §§132 (2), 146, 220, 226; and, *post*, §244. See also, text, §§85, 87, 88.]

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; [see, *ante*, §§137, 171, 212, 229 (5). See also, text, §88.]

2. Where the drawee is dead, presentment may be made to his personal representative; [see, *ante*, §§136, 169. See also, text, §88.]

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustees or assignee. [See, *ante*, §172. See also, text, §88.]

Section 243. *On What Days Presentment May Be Made.* A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 132 and 145 of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day. [See, *ante*, §5. See also, text, §87.]

Section 244. *Presentment; Where Time Is Insufficient.* Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. [See, *ante*, §§141, 184, 240 (3), 264. See also, text, §96.]

Section 245. *Where Presentment Is Excused.* Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases: [see, *post*, §246 (2.)]

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill; [see, *ante,* §§142 (2), 185 (2), 186, 242 (2). See also, text, §96.]

2. Where after the exercise of reasonable diligence, presentment cannot be made; [see, *ante,* §§142 (1), 183. See also, text, §§61, 96.]

3. Where although presentment has been irregular, acceptance has been refused on some other ground. [See text, §§87, 96.]

Section 246. *When Dishonored by Non-Acceptance.* A bill is dishonored by non-acceptance: [see, *ante,* §§143, 160, 226; and, *post,* §248.]

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or, [see, *ante,* §230, and, *post,* §247. See also, text, §§38, 39, 61.]

2. When presentment for acceptance is excused and the bill is not accepted. [See, *ante,* §245. See also, text, §61.]

Section 247. *Duty of Holder Where Bill Not Accepted.* Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers. [See, *ante,* §§111, 160, 188, 189, 224, 241, 246 (1); and, *post,* §260. See also, text, §87.]

Section 248. *Rights of Holder Where Bill Not Accepted.* When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. [See, *ante,* §§2 "Holder," 90, 130, 160, 246; and, *post,* §§260, 264, 265. See also, text, §§87, 96.]

ARTICLE XIII.

PROTEST OF BILLS OF EXCHANGE.

Section 260. *In What Cases Protest Necessary.* Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the

drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary. [See, *ante,* §§111, 116, 143, 189, 213, 247, 248; and, *post,* §§261, 263, 264, 265, 267, 286. See also, text, §§87, 95.]

Section 261. *Protest; How Made.* The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify: [see, *post,* §§262, 268. See also, text, §95.]

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Section 262. *Protest; By Whom Made.* Protest may be made by:

1. A notary public; or, [see text, §95.]
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. [See text, §95.]

Section 263. *Protest; When to Be Made.* When a bill is protested, such protest must be made on the day of its dishonor, unless the delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. [See, *ante,* §§143, 224, 246; and, *post,* §§266, 267. See also, text, §95.]

Section 264. *Protest; Where Made.* A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. [See, *ante,* §§133, 248, 260, 264. See also, text, §95.]

Section 265. *Protest Both for Non-Acceptance and Non-Payment.* A bill which has been protested for non-acceptance may be subsequently protested for non-payment. [See, *ante,* §§187, 248, 260, 264. See also, text, §95.]

Section 266. *Protest before Maturity Where Acceptor In-*

solvent. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. [See, *post,* §280.]

Section 267. *When Protest Dispensed with.* Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. [See, *ante,* §§180, 182, 183, 184, 185, 186, 188. See also, text, §96.]

Section 268. *Protest Where Bill Is Lost, et cetera.* Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. [See text, §95.]

ARTICLE XIV.

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

Section 280. *When Bill May Be Accepted for Honor.* Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. [See, *ante,* §§260, 266; and, *post,* §300.]

The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. [See, *ante,* §229 (2).]

Section 281. *Acceptance for Honor; How Made.* An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. [See, *ante,* §220.]

Section 282. *When Deemed to Be an Acceptance for Honor of the Drawer.* Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Section 283. *Liability of Acceptor for Honor.* The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Section 284. *Agreement of Acceptor for Honor.* The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him. [See, *ante,* §§112, 132, 261; and, *post,* §286. See also, text, §82.]

Section 285. *Maturity of Bill Payable After Sight; Accepted for Honor.* Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Section 286. *Protest of Bill Accepted for Honor, et cetera.* Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need. [See, *ante,* §§215, 261, 284.]

Section 287. *Presentment for Payment to Acceptor for Honor; How Made.* Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity; [see, *ante,* §264.]

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.

Section 288. *When Delay in Making Presentment Is Excused.* The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Section 289. *Dishonor of Bill by Acceptor for Honor.* When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

Section 300. *Who May Make Payment for Honor.*

Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. [See, *ante,* §280; and, *post,* §§303, 305.]

Section 301. *Payment for Honor; How Made.* The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it. [See, *post,* §302.]

Section 302. *Declaration Before Payment For Honor.* The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. [See, *ante,* §301.]

Section 303. *Preference of Parties Offering to Pay for Honor.* Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Section 304. *Effect on Subsequent Parties Where Bill Is Paid for Honor.* Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. [See, *ante,* §§90, 201 (3), 202; and, *post,* §306.]

Section 305. *Where Holder Refuses to Receive Payment* Supra *Protest.* Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment. [See, *ante,* §201 (4).]

Section 306. *Rights of Payer for Honor.* The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. [See, *ante,* §§134, 304.]

ARTICLE XVI.
BILLS IN A SET.

Section 310. *Bills in Sets Constitute One Bill.* Where a bill is drawn in a set, each part of the set being numbered and

containing a reference to the other parts, the whole of the parts constitute one bill. [See, *ante,* §210; and, *post,* §§311, 312, 313, 314, 315. See also, text, §13.]

Section 311. *Rights of Holders Where Different Parts Are Negotiated.* Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. [See, *ante,* §§90, 112, 200 (1). See also, text, §§19, 61, 82, 101.]

Section 312. *Liability of Holder Who Indorses Two or More Parts of a Set to Different Persons.* Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. [See, *ante,* §116. See also, text, §§61, 82.]

Section 313. *Acceptance of Bills Drawn in Sets.* The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. [See, *ante,* §§96, 112, 220; and, *post,* §315. See also, text, §37.]

Section 314. *Payment by Acceptor of Bills Drawn in Sets.* When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. [See, *ante,* §§96, 116 (2), 134. See also, text, §§81, 100.]

Section 315. *Effect of Discharging One of a Set.* Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged. [See, *ante,* §§200, 310, 313. See also, text, §101.]

ARTICLE XVII.
PROMISSORY NOTES AND CHECKS.

Section 320. *Promissory Note Defined.* A negotiable promissory note within the meaning of this act is an uncondi-

tional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. [See, *ante,* §§2, "Person," 20, 21, 22, 23, 26, 27, 28, 36 (5), 214. See also, text, §§9, 12, 15, 96.]

Section 321. *Check Defined.* A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check. [See, *ante,* §§2 "Bank," 210. See also, text, §§9, 104; and Appendix B, Cases No. 6 and 34.]

Section 322. *Within What Time a Check Must Be Presented.* A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. [See, *ante,* §§4, 92, 131, 145. See also, text, §107.]

Section 323. *Certification of Check; Effect of.* Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance. [See, *ante,* §§112, 220; and, post, §§324, 325. See also, text, §105.]

Section 324. *Effect Where the Holder of Check Procures It to be Certified.* Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon. [See, *ante,* §§2 "Holder," 111, 116, 323. See also, text, §§12, 106.]

Section 325. *When Check Operates as an Assignment.* A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. [See, *ante,* §§211, 323. See also, text, §§5, 108; and Appendix B, Cases No. 6 and 34.]

ARTICLE XVIII.
NOTES GIVEN FOR A PATENT RIGHT AND FOR A SPECULATIVE CONSIDERATION.

Section 330. *Negotiable Instruments Given for Patent Rights.* A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to

make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article. [See, *ante,* §§20, 25.]

Section 331. *Negotiable Instruments for a Speculative Consideration.* If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder. [See, *ante,* §§20, 25.]

Section 332. *How Negotiable Bonds Are Made Non-Negotiable.* The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this state, but not registered in pursuance of any state law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence. [See, *ante,* §77.]

APPENDIX B.

ILLUSTRATIVE CASES.

CASE No. 1.

MERCHANTS' LOAN & TRUST CO. *v.* LAMSON.

(1899) 90 Ill. App. 18.

Facts: Van Bokklen, a teller in the Trust Company's bank, began speculating through Lamson, a broker, losing about $10,000 which he had embezzled from the bank, but of which embezzlement Lamson was not aware although he knew the position held by Van Bokklen. Suit was brought by the Trust Co. to recover the money from the broker.

Argument of Defeated Party (Trust Co.): The broker was in possession of knowledge which should have aroused his suspicions and should have caused him to make an inquiry, which would have led to knowledge of the source from which Van Bokklen obtained the money. Not having made any inquiry the broker was not diligent, and should be held liable.

Law Applied (Opinion delivered by Presiding Just. Sears of the App. Ct.): Where money, transferred to an honest taker, was obtained through a felony by the one transferring it, the taker so receiving it without knowledge of the felony and in due course of business will acquire good title as against the one from whom it has been stolen. "Mere ground of suspicion of defect of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker will not defeat title. Bad faith alone will defeat the right of the taker without knowledge." The test is not diligence; hence the Trust Co. cannot recover the money in this case.

CASE No. 2.

MERRICK *v.* BOURY.

(1854) 4 Ohio St. 60.

Facts: Merrick being indebted to Boury for goods sold, a dispute arose between them in regard to the price, character and quantity of the goods. Merrick offered his note for $548.04 which was received by Boury, but the latter, after receiving it, added a clause thereto calling for exchange on Balti-

more, informing Merrick by letter at once of such addition. Merrick did not make any reply. When the note became due, Merrick offered to pay the original amount of the note, but refused to pay the difference of exchange; and suit was brought based both on the altered note and on the price of the goods sold and delivered.

Argument of Defeated Party (Merrick): Giving a promissory note in payment of a pre-existing debt operates as an accord and satisfaction and an extinguishment of the original debt, so that the holder can recover only upon the note; and the alteration of the note by the holder without the consent of the maker avoided it so that there cannot be any recovery on the note. Hence, the holder does not have any remedy of any kind.

Law Applied (Opinion delivered by Ch. Just. Thurman of the Supreme Ct.): Tampering with a security, however honestly, is a dangerous thing and ought not to be encouraged. Where an alteration is fraudulent there cannot be any recovery, either on the instrument or on the original cause of action. In this case, however, the alteration was made under an honest mistake of right, and no injury has resulted. Boury can recover on the original cause of action for which the note was given, as the giving of a note by a debtor will not constitute payment of the debt unless made so by agreement of the parties. In some cases such an agreement may be inferred from the circumstances, but there is no such inference here.

CASE No. 3.

EQUITABLE TRUST COMPANY OF NEW YORK *v.* TAYLOR.

(1911) 146 Appellate Div. 424; 131 N. Y. Supp. 475.

Facts: Prior to July 10, 1905, without notice of any defects and for full value the Trust Co. acquired an instrument reading as follows:

"New York, April 19th, 1905.

Mr. Archibald C. Haynes,
General Agent,
The Equitable Life Assurance Society,
No. 25 Broad street, N. Y:

Dear Sir.—I hereby acknowledge having received from Mr. W. E. Watts policy No. 1447474 being for $1,000.00 on my life in the Equitable Life Assurance Society. You are authorized and requested to place the said policy in force from this

date, and I promise to pay you or your order the first annual premium, amounting to $53.10, as follows:

Cash paid W. E. Watts,	$21.24
On July 10th, 1905,	10.00
On Sept. 10th, 1905,	10.00
On Nov. 10th, 1905,	11.86
	$53.10

Very truly yours,
Arthur S. Taylor."

The Trust Co. brought suit for $31.86.

Argument of Defeated Party (Taylor): The instrument is not negotiable.

Law Applied (Opinion delivered by Just. Burr of the N. Y. App. Div.): The instrument is negotiable, as all the requirements mentioned in the Negotiable Instruments Law (§20) appear therein. It is in writing, and signed by Taylor who made the same; it is payable to Archibald C. Haynes or order; and it is payable at a fixed or determinable future time. The fair meaning of the language used is, I promise to pay you or your order $53.10, being the annual premium on policy of life insurance, less cash paid W. E. Watts on account, $21.24, to wit, $31.86 in three separate amounts, to wit, $10 on July tenth, $10 on September tenth, and $11.86 on November 10th, 1905. It is an unconditional promise to pay this certain sum in money. The mere fact it contains language from which it appears that the consideration for the promise was an indebtedness for a balance remaining unpaid of the first annual premium upon a policy of life insurance which had been actually delivered to the maker would not make it non-negotiable. (N. I. L., §22). The words, "You are authorized and requested to place the said policy in force from this date" do not make the promise conditional upon some act to be performed by the general agent of the insurance company. The words are mere surplusage, as the policy, when delivered with the authority of the general agent, immediately became a binding contract enforceable against the company, so that there was nothing which Haynes was required to do to place the policy in force. The Trust Co. being a holder in due course (N. I. L. §91), the instrument is free from any defect in the title of any prior party and free from defenses available to any prior party; hence the Trust Co. can enforce payment.

CASE No. 4.

CASCO NATIONAL BANK OF PORTLAND, MAINE, *v.* CLARK.

(1893) 139 N. Y. 307; 34 N. E. 908; 36 Am. St. 705; aff'g (1892) 64 Hun, 634; 18 N. Y. Supp. 887; 46 N. Y. St. 162.

Facts: A promissory note was given in the following form:

"Brooklyn, N. Y., Aug. 2, 1890.

$7,500.

"Three months after date, we promise to pay to the order of Clark & Chaplin Ice Company, seventy-five hundred dollars at Mechanics' Bank: value received.

"JOHN CLARK, Prest.

"E. H. CLOSE, Treas."

Across the left-hand end was "Ridgewood Ice Co.," of which corporation Clark and Close were officers. The note was delivered in payment of ice sold by the Clark & Chaplin Co. to the Ridgewood Co. under a contract between the companies. Suit was brought against Clark and Close individually, as makers of the note.

Argument of Defeated Party (Clark and Close): They signed as officers of the Ridgewood Ice Co. and did not become personally liable.

Law Applied (Opinion delivered by Judge Gray of the Ct. of App.): Where a title to a corporate office is affixed to the signature on a note, such title is regarded as descriptive of the person and not of the character of the liability, and the promise is that of the subscriber unless the promise purports to be by the corporation. As the corporation has not made any promise on this note, Clark and Close are personally liable thereon.

CASE No. 5.

SNYDER *v.* CORN EXCHANGE NATIONAL BANK.

(1908) 221 Pa. St. 599; 70 Atl. 876; 128 Am. St. 780.

Facts: Snyder employed Greenfield as a confidential clerk and manager, giving him a written general power of attorney to draw checks in Snyder's name. Greenfield drew four checks on the Bank, aggregating $18,387.50, payable to the order of "Charles Niemann," but not having any intention that any such person should receive the checks or have any right to them. Greenfield then wrote the name of Charles Niemann on the back of the checks and delivered them, for his personal use, to Miner & Co., who indorsed them and deposited them with the Real Estate Title Insurance and Trust Company. The latter

Company, having warranted previous indorsements, received payment of the checks from the Bank, who charged the amount thereof against Snyder's deposit. Snyder brought suit against the Bank to recover this amount.

Argument of Defeated Party (Snyder): The Bank is liable for money paid on a forged indorsement. It can, in turn, have reimbursement from the Real Estate Title Insurance & Trust Co. on their warranty.

Law Applied (Opinion delivered by Just. Brown of the Supreme Ct.): Niemann may have been an existing person, but he was a fictitious one within the meaning of our Negotiable Instruments Law, §28 (3), that a check is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable," if Greenfield used the name as that of a person who should never receive the checks or their proceeds nor have any right to them. The intent of the drawer in inserting the name of the payee is the sole test whether the payee is a fictitious person; and, in this case, the intent of the agent of the drawer was the intent of the drawer himself. A fictitious person is not merely a non-existing one; for, if so, the word "non-existing" would have been sufficient in the statute without more.

The warranty of the previous indorsements by The Real Estate Title & Trust Co. was of that by Miner & Co., for it was the only one, in legal contemplation, on the checks when received by them, as the checks were payable to bearer. The checks, being payable to bearer, were not paid on a forged indorsement, and the Bank is not liable.

CASE No. 6.

VAN BUSKIRK *v.* STATE BANK OF ROCKY FORD.

(1905) 35 Colo. 142; 83 Pac. 778; 117 Am. St. 182.

Facts: Van Buskirk, who was running a bank, was offered a check on the State Bank located in the same place. He telephoned the State Bank, asking if the check was good, and was informed that it was "all right." Van Buskirk then cashed the check. A few minutes later, the drawer of the check stopped its payment at the State Bank. Van Buskirk, being unable to collect the check, brought suit against the Bank.

Argument of Defeated Party (Van Buskirk): The drawee had promised to pay the check.

Law Applied (Opinion delivered by Just. Campbell of the Supreme Ct.): Strictly speaking there is no such thing as

acceptance of a check in the ordinary sense of the term; yet, with the consent of the holder, the drawee bank, instead of making payment, may enter into an engagement quite similar to that of acceptance, by certifying the check to be good. A check itself does not operate as an assignment of any part of the fund to the credit of the drawer in the bank, and the drawee bank is not liable to the holder unless and until it certifies the check [N. I. L., §325]; and as the provisions of the statute in regard to a bill of exchange apply to a check [N. I. L., §321], certification of a check must be in writing. In this case, there not having been any certification of the check in writing, the holder is not entitled to recover from the Bank.

CASE No. 7.

TRENT TILE COMPANY *v.* FORT DEARBORN NATIONAL BANK OF CHICAGO.

(1891) 54 N. J. Law (25 Vroom) 33; 23 Atl. 423; aff'd (1892) 54 N. J. Law (25 Vroom) 599; 25 Atl. 411.

Facts: Riley, in Chicago, drew a bill of exchange on the Trent Tile Company, of Trenton, N. J., for $850, dated November 7, 1888, payable to the order of the Bank, which the latter forwarded to the Mechanics National Bank of Trenton for presentment and collection. The Mechanics Bank presented the bill to the drawee on November 12th, which wrote on the bill its acceptance, payable at the Mechanics Bank, and redelivered the bill to the Bank, although the Tile Co. did not have any funds of the drawer. Later in the day the Tile Co., learning that Riley had failed on November 10th, asked the Mechanics Bank for leave to revoke acceptance, which the Bank declined to permit; and thereupon the Tile Co. gave notice to the Bank to refuse payment. The Ft. Dearborn Bank brought suit against the Tile Co. on its acceptance.

Argument of Defeated Party (Tile Co.): The act of Riley in drawing the bill when insolvent and owing the drawee, was a fraud; and the acceptance could be revoked.

Law Applied (Opinion delivered by Just. Knapp of the Supreme Ct.): While an acceptance can be revoked before its delivery by the acceptor, after delivery it becomes irrevocable, except by mutual consent, even though the acceptance was for the accommodation of the drawer. Where a bill of exchange is forwarded to a bank for the purpose of having presentment made for acceptance, the relation of principal and agent is cre-

ated between the holder and the bank, and the agent has authority to receive delivery of the acceptance in behalf of the holder; and delivery to a duly authorized agent is, in legal effect, delivery to the holder.

The fraud of the drawer, if any, cannot affect the rights of the Ft. Dearborn Bank as a holder in due course.

CASE No. 8.

GREELE *v.* PARKER.

(1830) 5 Wend. 414; aff'g Parker *v.* Greele, (1829) 2 Wend. 545.

Facts: Greele, on February 9, 1827, wrote Stone, a paper-manufacturer: "I have received 42 bundles medium as you mentioned. The imperial I think will sell readily. I have no objections to accepting for you for 3 and 4 months for $2,500, on the terms you propose." Stone drew a bill of exchange on Greele for $2,500, dated February 11, 1827, payable four months after date, which Parker indorsed for the accommodation of Stone after being shown the letter from Greele. The bill was discounted at a bank which forwarded it for Greele's acceptance, but he refused to accept; and, Stone having failed, Parker paid the bank and brought suit against Greele.

Argument of Defeated Party (Greele): The letter could not be construed as an acceptance; or, if it could, the draft did not comply with the terms named in the letter.

Law Applied (Opinion delivered by the Supreme Ct. of N. Y.): An unconditional promise in writing to accept a bill of exchange, if made within a reasonable time before or after the date of the bill and describing the same in terms not to be mistaken, is a virtual acceptance thereof in favor of any person to whom such promise has been shown. The knowledge that a draft will be accepted is often of the utmost importance to the drawer in assisting the negotiation thereof.

The bill having been drawn for the whole amount at four months—the longest period, instead of half of the amount at three months and the balance at four months, was an advantage to Greele, the acceptor, and objection cannot be made on that account.

CASE No. 9.

FARMERS' & MERCHANTS' BANK *v.* BANK OF RUTHERFORD.

(1905) 115 Tenn. (7 Cates) 64; 88 S.W. 939; 112 Am. St. 817.

Facts: A forged check read as follows:

"Dyer, Tenn. Oct. 28, 1903.

Farmers' & Merchants' Bank:

Pay to J. L. Freeman, or bearer, fifty-four 75/100 dollars. For cotton.

JOHNSTON MERC. CO."

It was indorsed "J. L. Freeman," and cashed, without identification of the holder, by the Bank of Rutherford which, in turn, indorsed it. It then passed successively to the Jackson Banking Company, the St. Louis Trust Company, Continental National Bank of Chicago, and Fourth National Bank of Nashville. The latter bank was paid by the Farmers' and Merchants' Bank. The forgery having been discovered about thirty days afterwards, suit was brought against the Bank of Rutherford as an indorser.

Argument of Defeated Party (F. & M. Bank): The Bank of Rutherford was negligent in not requiring identification.

An indorser warrants the genuineness of the instrument.

Law Applied (Opinion delivered by Judge Wilkes of the Supreme Ct.): The check, being payable to Freeman or bearer, did not require indorsement, nor was it necessary that the holder should be identified; hence the Bank of Rutherford was not negligent.

The warranty of an indorser of a negotiable instrument as to the genuineness of the signature of the drawer, extends only to subsequent holders in due course and not to the drawee, as the drawee is not a holder in due course. A holder in due course is defined in the Negotiable Instruments Law [§91], but the definition does not embrace the drawee. The drawee is the party to pass upon the genuineness of the signature of the drawer. [N. I. L., §112.] There cannot be any recovery by the Farmers' & Merchants' Bank from the Bank of Rutherford.

CASE No. 10.

GRIMES *v.* PIERSOL.

(1865) 25 Ind. 246.

Facts: A promissory note for $100 was executed by George W. Grimes payable to Noah W. Grimes. Noah indorsed it: "Pay to T. C. Barton or order. March 6, 1861. N. W. Grimes." The name of "T. C. Barton" was erased and "Isaac Piersol" substituted therefor. Piersol, being unable to collect the note from the maker, called upon the indorser for payment, who wrote that he would arrange for its settlement; but when Grimes wrote this letter he was not aware of the alteration. Piersol sued Grimes on his indorsement.

Argument of Defeated Party (Piersol): A holder has the right to substitute his own name in an indorsement in full.

The letter written by the indorser, after the substitution, was an acknowledgment of his liability.

Law Applied (Opinion delivered by Judge Elliott of the Supreme Ct.): An indorsement is a distinct contract. While the holder of a negotiable instrument bearing an indorsement in blank has implied power to fill up the indorsement with any name he may desire, an indorsement in full cannot be changed without the consent of the indorser. Such a change is a material alteration of the indorser's contract, as it deprives him of any defense he might have against the indorsee. A material alteration makes the indorsement void and no longer a contract by the indorser, and prevents recovery from him.

The letter written by the indorser was not consent to the alteration or a waiver thereof, as, at the time it was written, he supposed Piersol held the note under a regular indorsement from Barton.

CASE No. 11.

BLAINE, GOULD & SHORT *v.* BOURNE & CO.

(1875) 11 R. I. 119; 23 Am. Rep. 429.

Facts: A draft on B. G. Chace & Co., drawn by Thayer payable to his own order and indorsed by him in blank, was discounted by Blaine, Gould & Short who indorsed it: "Pay Jay Cooke & Co. or order on account of Blaine, Gould & Short, North East, Pa. Alfred A. Short, Cash'r." Jay Cooke & Co. indorsed it: "Pay to the order of Messrs. Bourne & Co. Jay Cooke & Co.," and sent it to Bourne & Co. for collection, who collected it on September 18, 1875, about an hour after Jay Cooke & Co. failed. As Jay Cooke & Co. were owing Bourne & Co., the latter applied the proceeds of the draft on their claim.

Argument of Defeated Party (Bourne & Co.): The draft belonged to Jay Cooke & Co. as indorsees, and the proceeds could be applied on their indebtedness.

Law Applied (Opinion delivered by Just. Potter of the Supreme Ct.): While a general indorsement is *prima facie* evidence of ownership by the indorsee, the restrictive indorsement in this case gives express notice that the indorsee has not paid any consideration for the instrument and has no ownership therein, but is rather an agent of the indorser. Subsequent holders become sub-agents subject to a trust for the indorser in the restrictive indorsement; hence Bourne & Co., did not have

any right to apply the proceeds of this draft to the payment of a debt due them from Jay Cooke & Co. The money when collected belonged to Blaine, Gould & Short.

CASE No. 12.

KAUFMAN *v.* STATE SAVINGS BANK.

(1908) 151 Mich. 65; 114 N. W. 863; 123 Am. St. 259.

Facts: In payment of a loss by fire, a check was delivered to Kaufman payable to the order of himself and wife. Kaufman indorsed his name, and also that of his wife although without authority from her to do so, and transferred the check to the Bank, which paid the proceeds of the check to Kaufman. Mrs. Kaufman brings suit against the Bank.

Argument of Defeated Party (Bank): Not having been any delivery of the check to Mrs. Kaufman, she did not have any title to it.

A debt to two jointly may be paid to either, and Mrs. Kaufman's indorsement was unnecessary.

Law Applied (Opinion delivered by Just. Montgomery of the Supreme Ct.): Mrs. Kaufman could affirm her husband's receipt of the check.

If several persons, not partners, are payees or indorsees of a bill or note, it must be indorsed by all of them, unless one has express or implied authority to indorse as agent for the others. There is no presumption in this case that Kaufman could indorse for his wife.

CASE No. 13.

WILLIAMS *v.* TISHOMINGO SAVINGS INSTITUTION.

(1880) 57 Miss. 633.

Facts: Williams indorsed a bill of exchange title to which he claimed under a forged indorsement.

Argument of Defeated Party (Williams): An indorser of a bill of exchange incurs no liability except on an implied guaranty that the drawee will pay it on presentation.

Law Applied (Opinion delivered by Ch. Just. George of the Supreme Ct.): An indorser warrants the genuineness of the prior indorsements and also his title. Should it be ascertained that any of the indorsements are forged, the drawee can recover the amount from the person he paid; and so each preceding indorser may recover from the person who indorsed to him. While the drawee is bound to know the signature of the drawer, he is not bound to know the signatures of indorsers. In this case the indorser is liable on his warranty.

CASE No. 14.

KEEL *v.* CONSTRUCTION COMPANY.

(1906) 143 N. Car. 429; 55 S. E. 826.

Facts: The East Carolina Stone and Construction Company agreed to construct a building, on a lot owned by Keel, for $5,950 to be paid as follows: $950 when the walls were erected to the second story; $1,000 when the building was covered, and the balance in four annual installments of $1,000 each. Keel delivered to the company four notes for the annual installments, which the Company delivered to the National Bank of Goldsboro as collateral security but without indorsement. When the building was about half covered, it was accidentally destroyed by fire, and the Company refused to go on with the work. Keel then applied for a cancellation and redelivery of his four notes, which was refused by the Bank; and Keel brought suit against the Company and the Bank.

Argument of Defeated Party (Bank): There was no failure of consideration; or, if so, the Bank is not affected as it is a holder for value.

Law Applied (Opinion delivered by Just. Hoke of the Supreme Ct.): The four notes were to be paid only after the completion of the building, which was never completed, and the amount represented and evidenced by the notes has never been earned and never was due, and the maker is entitled to have them delivered up and canceled.

Although the Bank is a holder for value, the notes were transferred to the Bank without indorsement, hence subject to the defenses and equities available against the payee.

CASE No. 15.

MCNAMARA *v.* JOSE.

(1902) 28 Wash. 461; 68 Pac. 903.

Facts: Jose gave his note for $1,000 to Daly, dated at Seattle, Wash., and payable at Cape Nome, Alaska, on July 1, 1900—about six months after its date, for part of the purchase price of a lot in Nome, Alaska, to which Daly falsely represented he had title. About three months after its execution McNamara acquired the note from Daly for $500, at which time McNamara knew that the maker was solvent but he did not make any inquiry of the maker. McNamara did not have any knowledge of any infirmity in the note, and did not think it strange that Daly would dispose of the note for half of its face value "as he was the kind of a fellow that wanted that much money at that time."

Argument of Defeated Party (Jose): The holder did not acquire the note in good faith.

In any event, recovery by the holder is limited to the amount he paid for the instrument.

Law Applied (Opinion delivered by Judge Fullerton of the Supreme Ct.): The Negotiable Instruments Law [§91] defines a holder in due course of a negotiable instrument; and further provides [§95] that to constitute notice of an infirmity or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of such facts that his action in taking the instrument amounted to bad faith. While there may be circumstances which would make the transferee of a negotiable instrument a holder in bad faith if he remains in willful ignorance of facts, his title is not to be overcome by slight circumstances. He does not owe the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. His rights are not to be determined by the test of diligence; and, unless he acts *mala fide,* his title will prevail. The purchase of a note at a discount is not of itself evidence of bad faith. Where the consideration for a transfer is grossly inadequate it might lead to the conclusion that the instrument was acquired for the purpose of speculating upon the chances of collection; but in this case the large discount loses much of its objection when it is remembered that the note is payable on the coast of Alaska which is inaccessible for a greater portion of the year and not at any time in the line of regular communication. Such an instrument certainly would not be sought by investors in commercial paper as long as there was a possibility of their being compelled to enforce its payment at that place.

The holder's recovery is not limited to the amount paid for the note, as the Negotiable Instruments Law [§96] provides that "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

CASE No. 16.

O'CALLAGHAN *v.* SAWYER.

(1809) 5 Johns. 118.

Facts: O'Callaghan gave a promissory note for $22.50, which was due on September 1, 1803. The payee indorsed it to Sawyer on March 10, 1808, though, prior thereto, the payee had

become indebted to the maker for goods sold. The indorsee brings suit against the maker for the full amount of the note.

Argument of Defeated Party (Sawyer): A claim by the maker of a promissory note against an indorser, cannot be set off against an indorsee.

Law Applied (Opinion delivered by the Supreme Ct. of N. Y.): The transferee of a note so long due and dishonored, takes it subject to all the equity and to every defense which existed against it in the hands of the indorser. The set-off should be allowed.

CASE No. 17.

LOMAX *v.* PICOT.

(1824) 23 Va. (2 Randolph), 247.

Facts: Picot executed his notes to Page for the purchase-price of a house and lot, which were indorsed without recourse to Lomax before maturity, in satisfaction of a debt held by Lomax. Lomax knew, at the time he acquired the notes, that they had been given for the purchase-price of property and knew the property. The title to the property proving defective, the maker of the notes refused to pay them, and the holder brings suit.

Argument of Defeated Party (Picot): The indorsee was not a holder in due course.

Law Applied (Opinion delivered by Judge Green of the Ct. of App.): An indorsement of a negotiable instrument *prima facie* imports a full and valuable consideration until the contrary is shown. An indorsement without recourse is not out of the due course of trade, nor does such an indorsement indicate, in any case, that the parties to it are conscious of any defect in the instrument transferred. The indorser of these notes merely showed thereby that he was unwilling to make himself responsible for their payment and no suspicion was cast thereon. The indorser without recourse wishes the indorsee to proceed directly against the maker instead of against himself—to substitute the ultimate responsibility of the maker for the immediate responsibility of the indorser. It is but a prudent precaution of the indorser and does not prevent the indorsee taking the notes in due course of trade.

The transferee of a note is not prevented from being a *bona fide* holder merely because he knows the consideration for which it was given, if he does not know, at the time of the transfer, that it had failed or probably would fail. To make the holder subject to all future contingencies which might pro-

duce a failure of the consideration, would be to destroy credit. It is not the duty of a transferee of a negotiable instrument to inquire into the validity of the title of the property for which the instrument was given; that is the duty of the party executing it. An indorsee can recover unless chargeable with *mala fides,* which does not appear in this case.

CASE No. 18.

WARREN *v.* SMITH.

(1909) 35 Utah, 455; 100 Pac. 1069; 136 Am. St. 1071.

Facts: Warren, a fireman of the Southern Pacific Company in Nevada, was given his pay-check for $63.20 on March 23, 1904. Two nights afterwards his pocket-book, containing the unindorsed check, was stolen while he slept in a bunk-car. He notified his foreman and other superiors of the theft. On April 1st the check, with Warren's indorsement forged thereon, was transferred to Smith at Ogden, Utah, who in turn indorsed it, and it ultimately was paid by the treasurer of the Company. Warren brings suit to recover from Smith.

Argument of Defeated Party (Smith): Anyone acquiring a check without notice of defects in his transferror's title, is entitled to the proceeds thereof.

Law Applied (Opinion delivered by Ch. Just. Straup of the Supreme Ct.): A third party acquiring a negotiable instrument payable to bearer or indorsed in blank can acquire a good title, even from a robber, if received for a valuable consideration before maturity without notice; but a person cannot acquire title under a forged indorsement, even though he acts in good faith. When an unindorsed negotiable instrument is stolen, the owner may pursue it or the proceeds thereof wherever found.

CASE No. 19.

MASSACHUSETTS NATIONAL BANK *v.* SNOW.

(1905) 187 Mass. 159; 72 N. E. 959.

Facts: Stevens signed three promissory notes, payable to the order of Snow, for $2,432.33 each, "with interest," and delivered them to the payee. After Snow had indorsed these notes in blank and placed them in his desk, he was called out of his office, leaving Stevens there, who took the notes without Snow's knowledge, added "seven per cent." after "with interest," and discounted the notes at the Bank, which had no knowledge of these defects in the instrument or in the title. The maker having deceased, the Bank brings suit against Snow as indorser.

Argument of Defeated Party (Snow): The notes never were redelivered to Stevens.

The alteration by Stevens was a material one destroying the validity of the notes.

Law Applied (Opinion delivered by Ch. Just. Knowlton of the Supreme Ct.): The notes, after having been indorsed in blank by the payee named therein, became payable to bearer within the meaning of the statute [N. I. L., §28, clause 5.] When the notes were taken to the Bank for discount, Stevens was the bearer and presumed to be the owner, the indorsement apparently being an accommodation one. The Bank was a holder in due course within the definition of the statute, as there was nothing to put it on inquiry. The statute [§35] provides: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." This conclusive presumption exists when the note is received from a thief, if the instrument was complete at the time. In this case the defense of non-delivery cannot be set up against the Bank.

The statute [§205] provides that "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This enables the Bank to collect the notes with interest at the legal rate, which was the amount collectible on the notes as originally drawn.

CASE No. 20.

NATIONAL BANK OF COMMERCE IN ST. LOUIS *v.* SANCHO PACKING CO.

(1911) 186 Fed. 257.

Facts: Two promissory notes, aggregating $13,300, were signed by the Packing Co. for the accommodation of the indorsers, which were transferred by the holder to the Bank, before maturity, in the regular course of business.

Argument of Defeated Party (Packing Co.): When a corporation signs a note as an accommodation party, its act is *ultra vires* and it is not liable thereon.

The notes lacked consideration and, hence, are not enforceable.

Law Applied (Opinion delivered by Judge Shelby of the U. S. Circ. Ct. of App.): The notes were made by a corporation chartered to transact a packing-business, and which had authority to issue its notes in connection with its business; though of

course it ought not to have issued these notes for the accommodation of the indorsers, two of whom were officers of the Company. If all these facts had been known to the Bank when it received the notes, they would be fatal to its right of recovery; but the Bank did not have any knowledge of these facts—it is an innocent holder. It is essential to the credit of paper that, whatever may have occurred between other parties to the instrument, if the holder acquires it for value before maturity in the usual course of business he cannot be affected by such prior transactions unless he had knowledge thereof at the time he receives the instrument. Any different rule would weaken the credit given negotiable paper.

The fact that an agent, executing notes on behalf of his principal, has exceeded his actual authority, is no defense to a suit thereon by a holder who took them in good faith for value before maturity. If a corporation, under any circumstances, has the power to issue notes and bills, a *bona fide* taker has the right to presume that they were issued under circumstances which gave the requisite authority to issue them. The corporation is liable to the Bank on the notes in this case, under the apparent authority to issue them.

CASE No. 21.

FARMER'S BANK *v.* CRAWFORD.

(1916) 103 S. Car. 340; 88 S. E. 13.

Facts: In payment for goods sold, Crawford gave two promissory notes, aggregating $388.50, payable to the order of Talbert, which were immediately transferred to the Bank for value. About two weeks before the notes were due, Talbert told Crawford that they were lost, and induced Crawford to give duplicate notes, which were paid when due. The Bank brings suit on the original notes.

Argument of Defeated Party (Crawford): The notes have been paid.

The Bank was negligent in not giving notice that it held the notes.

Law Applied (Opinion delivered by Just. Watts of the Supreme Ct.): When a person executes a negotiable promissory note and parts with it, "it is like turning a fish loose in a stream where the public are entitled to fish; whoever catches it is entitled to enjoy it." "It does seem hard to satisfy good business men of the danger of giving negotiable notes unless they fully intend to pay that particular note." The maker, in

this case, was careless; he did not require from Talbert a bond to indemnify him if the lost notes turned up. The Bank acquired the notes in good faith for value before maturity, and is entitled to recover.

CASE No. 22.

DEAHY *v.* CHOQUET.

(1907) 28 R. I. 338; 67 Atl. 421; 14 L. R. A. N. S. 847.

Facts: Choquet, being desirous of borrowing money, called with Carroll upon Deahy and asked him for a loan upon a proposed note. Deahy offered to lend the money if the note should be indorsed by reliable persons. Choquet and Carroll called a little later and offered a note for $1,800, dated May 29, 1901, payable to the order of Beland, three months after its date at a designated bank; and upon the back of the note were the signatures, "J. H. Beland. Hugh J. Carroll. Hugh J. McGinn." The note never was presented for payment at the bank, either at or after maturity, and notice of dishonor was never given to the parties whose names were upon the back of the note. In August, 1901, a conversation occurred between Deahy and Carroll in which the latter said presentment of the note at the bank was unnecessary as it was all right and the names were all right. On February 8, 1904, an agreement was entered into, between Choquet and Deahy, providing for payment by installments if suit was not pressed against Choquet. Later, suit was brought against all four parties to the note.

Argument of Defeated Party (Deahy): All of the parties whose names were on the note at the time of its delivery are liable as joint makers. Even if presentment and notice were required, Carroll waived them.

Law Applied (Opinion delivered by Ch. Just. Douglas of the Supreme Ct.): The Negotiable Instruments Law [§113] provides that a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity. The signers on the back of the note in this case come within the plain language of the section. As accommodation indorsers they were entitled to notice of the dishonor, which they never received. The claim that the indorsers are liable as makers because the holder required good indorsers before he would advance the money, is the height of absurdity. The indorsers Beland and McGinn are discharged by failure to make presentment and to give notice of dishonor.

The conversation between Deahy and Carroll would amount to a waiver on Carroll's part, of presentment and notice; but the extension of time given by the holder to the maker discharged Carroll. The Negotiable Instruments Law [§3] provides: "The person 'primarily' liable, on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable." Another provision [§201] is that a person secondarily liable on the instrument is discharged by any agreement binding upon the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against said party is expressly reserved. Indorsers being secondarily liable, Carroll was discharged by the agreement between Deahy and Choquet not to press suit on the note against Choquet.

CASE No. 23.

IRONCLAD MFG. CO. *v.* SACKIN.

(1908) 129 App. Div. 555; 114 N. Y. Supp. 42; reversing 110 N. Y. Supp. 161; 59 Misc. 281.

Facts: A note, due October 23rd, was made payable at the Jenkins Trust Company, Bath Beach Branch, Brooklyn. It was presented for payment at the principal office of the Jenkins Trust Company on October 23rd, but presentment was not made at the Bath Beach Branch until the following day.

Argument of Defeated Party (Sackin): Presentment at the principal office was sufficient.

Law Applied (Opinion delivered by Just. Hooker of the N. Y. App. Div.): Where a negotiable instrument mentions a place of payment, it must be presented there in order to hold an indorser. (N. I. L., §133.) In this case presentment was not made at maturity at the place designated for its payment; therefore there was no sufficient presentment to charge the indorser.

CASE No. 24.

CHAMBERS *v.* HILL.

(1863) 26 Texas, 472.

Facts: Chambers drew a bill of exchange for $160 on Hutchins without specifying any time of payment. The bill was not presented for payment until two years and nine months after its date; and the drawer is sued for non-payment.

Argument of Defeated Party (Hill): The bill was presented for payment within a reasonable time.

Law Applied (Opinion delivered by Ch. Just. Wheeler of the Supreme Ct.): A time of payment not being specified, the bill is payable on demand, and presentment for payment must be within a reasonable time after the bill has been delivered, depending on distance and other matters; otherwise the drawer is discharged. What is a reasonable time when there is no usage of trade, must depend on the circumstances of each case. Without undertaking to ascertain a definite limit as to the time within which a bill must be presented, it ought to be presented at as early a day as it conveniently may be; and certainly there are no circumstances in this case justifying a delay of more than two and one-half years, and until after the drawer had settled his accounts and closed his business transactions with the drawee, the bill in the meantime having been kept in the hands of the payee. The delay was for an unreasonable time, and the drawer is consequently discharged from liability for payment.

CASE No. 25.

FARNSWORTH *v.* ALLEN.

(1855) 70 Mass. (4 Gray), 453.

Facts: A note, "Boston, May 23, 1853. Three months after date I promise to pay to the order of Walter M. Allen one hundred and fifty dollars, value received. Francis Freeman," was presented at nine o'clock in the evening at the residence of Freeman in Winchester, ten miles from Boston, after everyone had retired for the night. The maker, having come to the door with a light some time after the bell had been rung, refused to pay. Allen, the indorser, was given notice, and suit brought against him.

Argument of Defeated Party (Allen): Presentment was not made at a proper hour.

Law Applied (Opinion delivered by Judge Bigelow of the Supreme Ct.): The note, not being payable at a bank or at any place where business was transacted during certain stated hours in each day, was properly presented to the maker at his place of residence. No fixed rule can be established by which to determine the hour beyond which presentment, in such case, will be unreasonable and insufficient to charge an indorser. Generally it should be made at such hour that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. Taking into consideration the distance of the place of residence of the maker from Boston,

where the note was dated, the season of the year, presentment at nine o'clock in the evening was seasonable and sufficient. It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within a reasonable time cannot be made to depend on the private and peculiar habits of the maker of the note not known to the holder.

CASE No. 26.

SIMPSON *v.* TURNEY.

(1844) 24 Tenn. (5 Humphrey), 419; 42 Am. Dec. 443.

Facts: A note made by Jenkins to Dibrell was indorsed in the following order: A. Dibrell, S. Turney, Jno. W. Simpson. The Branch Bank of the State of Tennessee was the holder of the note at maturity, February 1, 1843. Turney, who lived within one mile of the Bank and whose residence was known to the Bank, was, on February 3rd, given notice of dishonor, which was all the notice he received. Simpson, the third indorser, brought suit against Turney, the second indorser.

Argument of Defeated Party (Simpson): If the first indorser had given Turney notice within the time allowed to the first indorser for giving notice, Turney would not have received it until February 3rd, which was the day notice was given Turney by the Bank.

Law Applied (Opinion delivered by Judge Reese of the Supreme Ct.): The notice given by the Bank being too late and of no benefit to it because not fixing the liability of the party notified, cannot inure to the benefit of another. Turney was discharged as to all parties by lack of proper notice of dishonor.

CASE No. 27.

PHILIP & WILLIAM EBLING BREWING CO. *v.* REINHEIMER.

(1900) 66 N. Y. Supp. 458; 32 Misc. 594.

Facts: The Ebling Co. was the holder of a note indorsed by Reinheimer, the note having been made by Reinheimer's sons. Notice of dishonor was sent by the Ebling Co. addressed to Reinheimer at No. 74 East Houston St., New York City, which place was owned by Reinheimer, was the place of business of his sons, and was visited by Reinheimer about twice a week. Reinheimer, however, lived and transacted business at No. 255 East Seventy-first st., New York City, and his sons resided with him.

Argument of Defeated Party (Ebling Co.): The notice was sufficient.

Law Applied (Opinion delivered by Just. McAdam of the N. Y. Supreme Ct.): By his contract of indorsement, an indorser of a negotiable instrument agrees to pay it if notified of the maker's default promptly, so that he can at once seek recourse from the party primarily liable. This condition is a substantial part of his contract and must be performed before the holder can recover from him (N. I. L. §160). In this case Reinheimer was discharged by lack of sufficient notice.

CASE No. 28.

WINDHAM BANK v NORTON, CONVERSE & CO.

(1852) 22 Conn. 213; 56 Am. Dec. 397.

Facts: A bill of exchange, payable in Philadelphia on Saturday, June 2nd, was indorsed by the payees—Norton, Converse & Co. to The Windham Bank, who indorsed it to the Ohio Life & Trust Co., of New York. Early on June 1st the Ohio Life & Trust Co. mailed the draft to Philadelphia to be presented the following day to the acceptors; but the post-office clerks missent the mailbag containing this letter to Washington, so that the letter was not delivered to the addressee in Philadelphia until Monday morning, June 4th, on which day presentment was made, payment refused as the acceptors were insolvent, protest made, and notice mailed to the Ohio Life & Trust Co. On the day the Ohio Life & Trust Co. received notice, it mailed notice to The Windham Bank which, on the day it received notice, mailed notice in turn to Norton, Converse & Co.

Argument of Defeated Party (Norton, Converse & Co.): To hold indorsers presentment must be made on the exact day of maturity, even though the instrument would not be paid if presented. The indorsee was negligent in not forwarding the instrument in time to allow for delay in the mail.

Law Applied (Opinion delivered by Judge Storrs of the Supreme Ct.): The general rule is that presentment for payment of a bill of exchange must be made on the very day it becomes due; and, unless it is so presented, there is no right of recovery against an indorser, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it. Whether there has been negligence on his part, no absolute, positive rule can be laid down which shall apply to all circumstances. It is a well settled rule that want of presentment is excused by an inevitable or unavoidable accident not attributable to the fault of the holder, provided there is a presentment

by him as soon after as he is able. The Ohio Life & Trust Co. is not chargeable with want of reasonable diligence. If they had put the bill of exchange in the post-office at so late a period that, by the ordinary course of mail, it could not have reached its destination in season for presentment when due, there would have been a want of reasonable diligence which would have exonerated the indorser. On the other hand, to throw the risk of forwarding the bill of exchange upon the holder where there has not been any such delay, would be most unreasonable and unjust and contrary to the understanding of the indorser, who is supposed to require only reasonable diligence on the part of the holder. To require the holder to forward a negotiable instrument at so early a period that if, by any accident, it should not reach the place of presentment in the regular course of mail there would still be time, would so restrict the time for transfer as to impair, if not destroy, its usefulness and value as a negotiable instrument, and would, in many cases, be wholly impracticable, as the casualties to the mail are most various in character. If, in this case, the holder had mailed the bill as soon as it received it—about three months before it became due, and it had been missent to a foreign country, which is possible, the error might not have been obviated before it fell due. Such a rule would be productive of great inconvenience and injustice without corresponding benefits. A sender by mail has a right to presume that postal employees will perform their duty. The missending of mail is an unavoidable accident so far as the person mailing it is concerned.

CASE No. 29.

REED *v.* SPEAR.

(1905) 107 App. Div. 144; 94 N. Y. Supp. 1007.

Facts: Spear was an indorser of a promissory note made by Lamkin payable in annual installments of $1,000 each. A few days before the installment of August 9, 1903, became due, the maker died, and a few days after it became due an administrator was appointed.

On the day the installment of August 9, 1904, became due, the holder lived in Sinclairville, and the administrator of the maker lived in Fredonia but had business interests in Sinclairville. The holder went two or three times to the banking-firm of which the administrator was a member. He also sought the administrator at the railroad-station at a time when he might be expected to leave or to arrive, but failed to find him.

The next day the holder sought to serve written notice upon the indorser personally at his store in Fredonia; but after one or more unsuccessful efforts, left the notice, sealed and addressed, with the indorser's wife who acted as his clerk and assistant. The following is a copy of the notice:

"Sinclairville, N. Y., August 9, '04.

To W. N. SPEAR:

Take notice that the last $1,000 installment of a note given to Emma J. Reed, August 9th, 1900, by Harry Lamkin and indorsed by you, fell due this day and remains unpaid at this hour of 9 P. M. and that I shall look to you for payment.

C. M. REED,
ADMN. E. J. REED EST."

The notice was actually received by the indorser on August 10, 1904.

Argument of Defeated Party (Reed): Notice of dishonor as to the first installment was excused.

(Spear): Proper presentment was not made as to the second installment, nor proper notice given

Law Applied (Opinion delivered by Just. Hiscock of the N. Y. App. Div.): The maker being dead and a personal representative not having been appointed, the holder was excused from presenting the note for payment of the installment due in 1903, under the provisions of section 136 of the Negotiable Instruments Law, which reads: "Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found"; but the holder, although excused under the circumstances from presentment for payment, was not excused from giving notice of dishonor to the indorser, section 160 of the statute providing: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given * * * to each indorser, and any * * * indorser to whom such notice is not given is discharged." Section 143 provides: "The instrument is dishonored by non-payment when: * * * 2. Presentment is excused and the instrument is overdue and unpaid." Although presentment for non-payment of the installment due August 9, 1903, was excused under such circumstances as existed in this case, the indorser was discharged as to such installment by failure to give notice.

When the next installment became due, there was a suffi-

cient compliance with the Negotiable Instruments Law, §136 and §142, as presentment for payment was dispensed with where the same could not be made "after the exercise of reasonable diligence." The notice of dishonor was in due time and properly served; and the indorser is liable for that installment.

CASE No. 30.

WORLEY *v.* JOHNSON.

(1910) 60 Fla. 294; 53 So. 543; 33 L. R. A. N. S. 639.

Facts: Johnson was the holder of two notes made by Edwards and West payable to the order of Worley and indorsed in blank by Worley. A few days before maturity the holder informed the makers personally that he was the holder and would expect payment at maturity, and the makers denied liability and said they would not pay the same at maturity or at any other time. A few days later the holder, before maturity, personally informed the indorser of the statements of the makers, and that the indorser would be looked to for payment. The indorser said that he was liable on the notes, and if the money could not be made out of the makers by suit, he would pay it. Presentment was not made at maturity.

Argument of Defeated Party (Johnson): The indorser by his words reasonably led to the belief that demand and notice would not be required.

Law Applied (Opinion delivered by Ch. Just. Whitfield of the Supreme Ct.): An indorser without qualification engages that on due presentment of the instrument it will be paid; and that if dishonored, the necessary proceedings being taken, he will pay the amount thereof to the holder. Under the statute an indorser of a negotiable promissory note is not liable if due presentment is not made to the maker for payment and notice of dishonor is not given, unless presentment and notice are excused, dispensed with, or expressly or impliedly waived. Waiver may be implied from conduct. Where, before maturity of a negotiable promissory note, an indorser thereof shows by unequivocal words or acts that he regards his liability as indorser to be absolute and not to be dependent upon proper presentment for payment and notice to him of the dishonor of the note, or by unequivocal words misleads the holder and induces him to dispense with presentment for payment and notice of dishonor, the indorser may be regarded as having waived his right to have due presentment made and notice of dishonor given to him; but a waiver of presentment and notice will not be inferred from doubtful acts or language of the

indorser. The language used by the indorser in this case is not inconsistent with his right to presentment and notice, and did not justify the holder in being misled or concluding that the indorser intended to waive his right to have due presentment made and notice of dishonor given to him as a condition annexed by law to the indorser's liability on the note. The makers might have changed their minds and paid the notes on due presentment. Presentment not having been made in this case, the indorser is not liable.

CASE No. 31.

MINOT *v.* RUSS.

HEAD *v.* HORNBLOWER.

(1892) 156 Mass. 458; 31 N. E. 489; 16 L. R. A. 510; 32 Am. St. 472.

Facts: These two cases were decided together, each involving the failure of the Maverick National Bank on Monday morning, November 2, 1891, before business hours.

On October 29th Russ drew a check on the Bank payable to the order of Minot. Minot informed Russ that the check must be certified before it would be received, and Russ had it certified the same day, and delivered it to Minot on Saturday, October 31st.

On October 31st Hornblower drew a check on the Bank payable to the order of Head, and delivered it to Head, who had it certified by the Bank that same day.

In each case presentment was made and due notice of non-payment given to the drawer.

Argument of Defeated Party (Russ): Certification of a check discharges the drawer.

(Head): Certification is in effect only an acceptance of a bill of exchange, and the drawer remains liable.

Law Applied (Opinion delivered by Ch. Just. Field of the Supreme Ct.): The Bank did not owe any duty to the drawers to certify the checks, although it could certify them if it saw fit, at the request either of the drawers or of the holders; and if it certified them it became bound directly to the holders. A bank, upon certification, charges to the account of the drawer the amount of the check. Where the drawer presents a check for certification, the drawer wishes the obligation of the bank in addition to his own obligation to pay, and the certification is for his convenience. Where the holder desires certification it is for his convenience, as he could demand payment if he chose. If the drawer gets his check certified and then delivers it, the

drawer is not discharged; but if the payee or holder gets it certified, the drawer is discharged, as the certification of a check is not, in all respects, like the acceptance of a bill of exchange. Russ is liable; but Hornblower is discharged.

CASE No. 32.

GORDON *v.* LEVINE.

(1907) 194 Mass. 418; 80 N. E. 505; 120 Am. St. 565.

Facts: A check, dated December 30, 1905, Saturday, was drawn by Levine, payable to Gordon. The bank on which the check was drawn was in Boston and the check delivered there. The payee, on Monday, January 1, 1906, passed the check to Saievitz in payment of a bill. On the 2nd Saievitz indorsed it to Rootstein, who deposited it on January 4th in the Faneuil Hall National Bank in Boston for collection. In the afternoon of the following day, Friday, it was presented to the bank on which it was drawn, but the latter had failed that day.

Argument of Defeated Party (Gordon): The transfer to successive holders extended the time of presentment, so that its presentment on Friday for payment was within a reasonable time.

Law Applied (Opinion delivered by Just. Morton of the Supreme Ct.): The Negotiable Instruments Law provides that a check must be presented within a reasonable time after it is issued.

If it is not so presented and the drawer sustains a loss by reason of the failure of the drawee, he will be discharged from liability to the extent of such loss. Where the drawer, drawee and payee of a check are all in the same city, the check, in order to be presented within a reasonable time, should be presented before the close of banking-hours on the day after it is issued; and its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If not presented within this time, the loss falls on the holder. The rule allowing the passing of a check from hand to hand to postpone the time of presentment applies only to checks drawn on a bank in one place and sent to a payee in another.

CASE No. 33.

PLOVER SAVINGS BANK *v.* MOODIE.

(1907) 135 Iowa, 685; 110 N. W. 29.

Facts: On March 8, 1903, Scholer gave Heathman a check payable to his order for $50 on the Greenville Bank, of Greenville, Iowa; and on March 12, 1903, Scholer gave Heathman a similar check, about which date Heathman indorsed both checks

to Moodie who, on Friday, March 13th, indorsed the checks to the Plover Savings Bank, at Plover, Iowa, and Moodie was paid $100 by the latter bank. Plover and Greenville, while but 45 miles apart, are on different railways and communication between them is quite indirect. The Plover bank sent the checks to its correspondent—the Des Moines Savings Bank at Des Moines, Iowa, on Saturday, March 14th. On Monday, March 16th, the Des Moines bank forwarded the checks to the Citizens' State Bank, of Spencer, Iowa, where they were received on March 17th. On the same day the Citizens' State Bank turned the checks over to the Citizens' National Bank of Spencer, a correspondent of the Greenville bank, which on March 18th forwarded them to the Greenville bank, where they were received the morning of March 19th, but they were not paid as payment had been stopped by the drawer. The method of forwarding was in accordance with the general customs prevailing among banks in dealing with checks drawn on banks in other places. Notice was duly given Moodie; and suit was brought on his indorsement.

Argument of Defeated Party (Moodie): There was unreasonable delay in the presentment of the checks for payment, caused by not forwarding them in a direct route.

Law Applied (Opinion delivered by Judge Weaver of the Supreme Ct.): Checks are an almost universal substitute for money. By the terms of the Negotiable Instruments Law, a bank-check is classed as a bill of exchange payable on demand; and, to charge the indorser of a bill of exchange payable on demand, presentment to the drawee shall be deemed sufficient if made within a reasonable time after its issue or after the last negotiation of such bill; and, in determining what is a reasonable time, regard must be had to the nature of the instrument, the usage of the trade or business, if any, with respect to such instruments, and the facts of the particular case. It is a matter of common knowledge that, by the system to which the handling of such business has been reduced, the innumerable checks and bills received by the banks scattered all over the country flow in concentrating currents to distributing banks, whence they go out to correspondent banks at or near the city or town where the drawee banks are located, for collection. In this case the checks did not go forward in an unreasonably circuitous route, and there was no unreasonable delay in presentment.

The indorser's implied contract is that if, upon presentment within a reasonable time, a check is dishonored and due notice

is given thereof, he will make it good to the indorsee; hence Moodie is liable to the Bank on this implied contract of indemnity.

CASE No. 34.

FISHER *v.* BAGNELL.

(1916) Mo. App.; 186 S. W. 1097.

Facts: Bagnell gave his check for $500 to Miss Fisher on August 3, 1912. On August 28th Bagnell died; and a few days later the check was presented for payment, payment refused, and Bagnell's administrators were notified. Miss Fisher seeks to enforce the check against Bagnell's estate.

Argument of Defeated Party (Bagnell): The death of the drawer operates to revoke the check altogether and to relieve his estate from any further liability whatever thereon. If the payee has any remedy, it is on the consideration for which the check was given.

Law Applied (Opinion delivered by Judge Allen of the St. Louis Ct. of App.): A check is a negotiable instrument—an inland bill of exchange [N. I. L., §321] and imports a consideration. [N. I. L., §50.] By drawing the instrument the drawer impliedly warrants that it will be paid on due presentment [N. I. L., §111]; but the Negotiable Instruments Law provides that a check does not operate as an assignment of any part of the funds to the credit of the drawer with the bank. [§325.] During his lifetime the drawer, by stopping payment, could have revoked the authority of the bank to pay the check; but if the instrument was one issued for a valuable consideration he would have been liable on it, after due presentment and the drawee's refusal to pay it. Death of the drawer of the check, with notice thereof to the bank, operated to revoke the authority of the latter to make payment, and it could not rightfully make payment thereafter. Upon his death the title to his funds in the bank passed immediately to his personal representative for proper distribution; and if the bank had paid the check it would have been liable in an action by the personal representative. Likewise, the holder would have been liable in an action to compel restitution. However, the fact that the drawer's death, and not his act, revoked the check, did not alter the liability on the warranty that it would be paid on due presentment. The holder is not required to resort to the original consideration for the check, but can assert a claim against the drawer's estate on the instrument itself.

CASE No. 35.

BACIGALUPO *v.* PARRILLI.

(1908) 112 N. Y. Supp. 1040.

Facts: On January 10, 1908, Parrilli delivered to Bacigalupo a check drawn upon "Banca P. Caponigri," where Parrilli had a deposit sufficient to pay it. The next day, Saturday, Bacigalupo presented the check at the bank of Caponigri and was told by the cashier that "we are kind of short of funds," and the cashier further told Bacigalupo that he could come Monday morning and the check would be cashed. On Monday Bacigalupo again presented the check, and was informed that the bank did not have any more money and could not pay the check; but Bacigalupo did not give the drawer any notice of non-payment.

Argument of Defeated Party (Bacigalupo): The drawer of a check is liable to indemnify the holder if it is not paid on due presentment.

Law Applied (Opinion delivered by Just. Seabury of the N. Y. App. Div.): When payment of a check has been refused, it is the duty of the holder to notify the drawer of that fact; and in the absence of such notice the drawer is discharged under section 160 of the Negotiable Instruments Law. If the drawer had been promptly notified of the refusal of the banker to pay the check, he might have been able to have taken action to secure the amount he deposited with the banker.

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B.L. indicates statement of principle in Black Letter type only.

I.C. indicates application of principle in an Illustrative Case.

N.I.L. indicates provision in the Negotiable Instruments Law.

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No. 101

[illegible] Brown Store Co.

Cleveland, Ohio, March [illegible]

Peoria [illegible]

[illegible] 1936 Pay to the order of [illegible]

[illegible] Dollars [illegible]

[illegible] at [illegible] March 7, 1936

Payable at Pioneer Trust & Bank

Brown Store Co.

[illegible] of accepts.

By D. E. Brown, [illegible]

By [illegible]

By A. M. Smith, [illegible]

Promissory note

[illegible] Cincinnati [illegible] June 4, 1936

[illegible] months after date [illegible]

[illegible] H. [illegible]

[illegible] Hundred [illegible]

Payable at [illegible]

[illegible] rate of [illegible]

L. M. [illegible]

[illegible] Sept. 1936

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